United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

No. 11,641

APPELLANT'S APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACQUES CODRAY, *Appellant*

857

Herbert Brownell, Jr.

v.

~~JAMES P. McGRANERY~~, Attorney General and Successor to the Alien Property Custodian, *Appellee*.

Appeal from the United States District Court for the District of Columbia

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United States Court of Appeals
For the
District of Columbia Circuit

FILED JAN 26 1953

Joseph W. Stewart
CLERK

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,641

JACQUES CODRAY, *Appellant*,

v.

JAMES P. MCGRANERY, Attorney General and Successor to the Alien Property Custodian, *Appellee*.

Appeal from the United States District Court for the District of Columbia

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APPELLANT'S APPENDIX

1 Filed May 28 1952 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUES CODRAY
40 West 72nd Street
New York City, New York
Plaintiff,

v.

JAMES P. McGRANERY
Attorney General and Successor
to the Alien Property Custodian,
Defendant.

Civil Action No. 2405—'52

Complaint

1. Plaintiff is a citizen of the United States and resides at 40 West 72nd Street, New York City, New York.

2. The defendant is the Attorney General of the United States and, by virtue of the provisions of Executive Order No. 9788, 11 F.R. 4891, dated October 14, 1946, the successor to the powers and duties of the Alien Property Custodian, and, by virtue of Executive Order No. 9989, 13 F. R. 4891, dated August 20, 1948, the officer of the President holding authority over frozen Hungarian assets.

3. This action arises under the Trading with the Enemy Act, as amended, hereinafter referred to as the Act, U.S.C.A.., Title 50, App., Section 1 *et seq.* and the Executive Orders, rulings and regulations issued thereunder; Title 28, U.S.C.A., Sections 1331, 1356; The Declaratory Judgment Act, Title 28, U.S.C.A. Sections 2201, 2202; The Administrative Procedure Act, Title 5, U.S.C.A., Sections 1001, *et seq.*; District of Columbia Code, Title

11-301; and the Fifth Amendment to the Constitution of the United States.

4. The Act authorized the so-called freezing of enemy assets and provided for the prohibition by the Executive Branch of the Government of all transfers of any frozen enemy assets, except as licensed, for such time as would be required by the Executive to determine whether to vest title to such property in the United States. U.S.C.A., Title 50, App. Section 5(b).

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5. Following the exercise of the freezing power, the Act provided for the vesting of enemy property (U.S.C.A., Title 50, App. Sections 7 and 5(b)), and provided for the return of non enemy property to the non enemy owners thereof. U.S.C.A., Title 50, App. Section 9(a).

6. With respect to vested property, the Act provided for the payment out of the vested property of the debt claims of citizens of the United States against the enemy owners of such property. U.S.C.A., Title 50, App. Section 34.

7. By a freezing order under date of March 13, 1941, Executive Order No. 8711, 6 F.R. 1443, the President froze all assets of Hungarian nationals then or thereafter located in the United States, which assets included all assets in the United States belonging to United Incandescent Lamp & Electrical Co., Ltd. (hereinafter referred to as "United") a Hungarian corporation.

8. By Vesting Orders No. 27, dated June 22, 1942, No. 112, dated September 1, 1942, No. 201, dated December 23, 1942, and No. 4220, dated October 23, 1944, the Alien Property Custodian vested certain of the frozen property belonging to United. The said property of United vested

by the Alien Property Custodian pursuant to the foregoing Vesting Orders amounted in cash to $37,457.35.

9. Prior to the application of the so-called freezing controls to Hungary on March 13, 1941, United was indebted to plaintiff in the amount of $56,620.50, exclusive of interest. Said debt remained due and owing to plaintiff at the time of the issuance of the Vesting Order mentioned in paragraph 3 hereof. Said debt did not arise from any action or transaction prohibited by any of the provisions of the Act.

10. Plaintiff is not an enemy or an ally of an enemy within the meaning of the Act. Plaintiff is completely and wholly free of any enemy taint. Plaintiff's debt claim, against United, which claim is secured by a valid attachment and judgment under New York law, as hereinafter set forth, is completely and wholly free of any enemy taint. Payment of plaintiff's secured claim would not accrue, directly or indirectly, to the benefit of any enemy.

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11. Plaintiff by his duly appointed attorneys, filed a debt claim against the vested property of United pursuant to Section 34 of the Act. Plaintiff submitted to the Alien Property Custodian evidence in proof of the validity of the said debt claim and its allowability under the Act.

12. Pursuant to Section 34 of the Act, the Attorney General, by his duly authorized agents and assistants, made an investigation and examination of the said debt claim and of all the evidence with respect thereto.

13. The only claim filed pursuant to the Act against the said vested property of United, other than that of the plaintiff, was a debt claim filed on behalf of Wells-Fargo Union Bank and Trust Company, San Francisco, California.

14. After the expiration of the last day for the filing of claims against the said vested property of United, and under date of June 27, 1950, the Honorable Harold I. Baynton, the then Acting Director of the Office of Alien Property made a Determination with respect to the foregoing claims pursuant to Section 34 of the Act. A copy of the said Determination is attached hereto as Exhibit "A" and made a part hereof.

15. Pursuant to the said Determination it was duly found that the debt claim of the plaintiff in the amount of $56,620.50 was an allowable claim pursuant to Section 34 of the Act. Pursuant to the said Determination, it was also found that the Wells Fargo Union Bank and Trust Company had an allowable claim pursuant to Section 34 of the Act.

16. Because the aggregate of the debt claims filed pursuant to the Act exceeded the amount of the vested assets of United, the said Determination provided for distribution of the $37,457.35 between the debt claimants in accordance with the terms of Section 34 of the Act. Of this amount, the Office of Alien Property withheld $7,491.47 for the payment of tax claims, if any, and for the expenses of that Office. The balance was distributed as follows: It was determined that there be paid to Wells-Fargo Union Bank and Trust Company on its debt claim the sum of $1,405.05. It was further determined that there be paid the plaintiff on his debt claim the sum of $28,560.83.

17. Under date of June 28, 1950, the said Honorable Harold I. Baynton wrote a letter to the attorneys for the plaintiff enclosing a copy of the aforesaid Determination and advising that payment of the sum of $28,560.83 would be made to the plaintiff in due course. The said letter also stated, "If additional cash

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should become available in the debtor's account, supplementary payment on the allowed claim could then be made to Dr. Jacques Codray." A copy of the said letter is attached hereto as Exhibit "B" and made a part thereof.

18. Thereafter, on September 8, 1950, payment was made to plaintiff of the sum of $28,560.83 in accordance with the aforesaid Determination.

19. Thereafter, plaintiff, by diligent search, discovered additional assets owned by and belonging to United.

20. On January 9, 1951, plaintiff, by his attorney, instituted an action in the Supreme Court of the State of New York, New York County against United (index No. 410/1951).

21. Plaintiff caused attachment warrants to be issued by the said court and levied on accounts maintained by United in New York City with J. P. Morgan and Company, Inc., 23 Wall Street, New York, N. Y., and Guaranty Trust Company, 140 Broadway, New York, N. Y. J. P. Morgan and Company, Inc., has certified that, at the time of the service of the said warrant of attachment upon it, J. P. Morgan and Company held 13,500 shares of the common stock of International Telephone and Telegraph Corporation in the name of United. Guaranty Trust Company has certified that, at the time of the service of the said warrant of attachment upon it, Guaranty Trust Company held an account with a balance of $7,134.47 in the name of United. The said attached assets of United have a value in excess of $200,000. The said attachments are still in force and effect.

22. On May 2, 1952, plaintiff obtained a judgment in the amount of $62,434.66 against United. Said judgment was duly entered on May 15, 1952. A copy of said judgment is attached hereto as Exhibit "C" and made a part hereof.

23. The Office of the Sheriff of the City of New York, New York County Division, has been unable to reduce the accounts to possession because the accounts are "frozen" by the federal government foreign funds controls, as hereinabove set forth.

24. Under date of January 22, 1951, plaintiff,
5 by his attorney, duly filed an application with the Department of Justice, Office of Alien Property, for a license authorizing the said Office of the Sheriff to reduce the attached frozen accounts to his possession.

25. Under date of April 4, 1952, the said Office of Alien Property wrote a letter to plaintiff which letter recites "that the application is denied for the reason that it involves property in which there is a Hungarian interest, the disposition of which is subject to determination of over-all governmental policy." A copy of said communication is attached hereto as Exhibit "D" and made a part hereof.

26. By said letter, defendant, pursuant to a policy not consistent with the Act, refused to issue a license to the plaintiff in violation of the provisions of the Act and in violation of defendant's Determination and Representation to the plaintiff.

27. Under date of April 16, 1952, plaintiff, by his attorney, filed an appeal from the aforesaid action with the said Harold I. Baynton, Assistant Attorney General, Director, Office of Alien Property.

28. Under date of April 30, 1952, the said Office of Alien Property wrote a letter to plaintiff, which letter advised the plaintiff of the denial of his appeal. A copy of said letter is attached hereto as Exhibit "E" and made a part hereof.

should become available in the debtor's account, supplementary payment on the allowed claim could then be made to Dr. Jacques Codray." A copy of the said letter is attached hereto as Exhibit "B" and made a part thereof.

18. Thereafter, on September 8, 1950, payment was made to plaintiff of the sum of $28,560.83 in accordance with the aforesaid Determination.

19. Thereafter, plaintiff, by diligent search, discovered additional assets owned by and belonging to United.

20. On January 9, 1951, plaintiff, by his attorney, instituted an action in the Supreme Court of the State of New York, New York County against United (index No. 410/1951).

21. Plaintiff caused attachment warrants to be issued by the said court and levied on accounts maintained by United in New York City with J. P. Morgan and Company, Inc., 23 Wall Street, New York, N. Y., and Guaranty Trust Company, 140 Broadway, New York, N. Y. J. P. Morgan and Company, Inc., has certified that, at the time of the service of the said warrant of attachment upon it, J. P. Morgan and Company held 13,500 shares of the common stock of International Telephone and Telegraph Corporation in the name of United. Guaranty Trust Company has certified that, at the time of the service of the said warrant of attachment upon it, Guaranty Trust Company held an account with a balance of $7,134.47 in the name of United. The said attached assets of United have a value in excess of $200,000. The said attachments are still in force and effect.

22. On May 2, 1952, plaintiff obtained a judgment in the amount of $62,434.66 against United. Said judgment was duly entered on May 15, 1952. A copy of said judgment is attached hereto as Exhibit "C" and made a part hereof.

23. The Office of the Sheriff of the City of New York, New York County Division, has been unable to reduce the accounts to possession because the accounts are "frozen" by the federal government foreign funds controls, as hereinabove set forth.

24. Under date of January 22, 1951, plaintiff, by his attorney, duly filed an application with the Department of Justice, Office of Alien Property, for a license authorizing the said Office of the Sheriff to reduce the attached frozen accounts to his possession.

5

25. Under date of April 4, 1952, the said Office of Alien Property wrote a letter to plaintiff which letter recites "that the application is denied for the reason that it involves property in which there is a Hungarian interest, the disposition of which is subject to determination of over-all governmental policy." A copy of said communication is attached hereto as Exhibit "D" and made a part hereof.

26. By said letter, defendant, pursuant to a policy not consistent with the Act, refused to issue a license to the plaintiff in violation of the provisions of the Act and in violation of defendant's Determination and Representation to the plaintiff.

27. Under date of April 16, 1952, plaintiff, by his attorney, filed an appeal from the aforesaid action with the said Harold I. Baynton, Assistant Attorney General, Director, Office of Alien Property.

28. Under date of April 30, 1952, the said Office of Alien Property wrote a letter to plaintiff, which letter advised the plaintiff of the denial of his appeal. A copy of said letter is attached hereto as Exhibit "E" and made a part hereof.

29. The aforesaid judgment remains unpaid and unsatisfied because of the refusal of the defendant to issue a license to the plaintiff.

30. As a result of the said attachment and judgment, plaintiff acquired a right, title and interest in the frozen property of United and, under the Act plaintiff is now entitled to payment out of said property to the extent of his interest in the amount of $62,434.66, together with interest from the date of the judgment.

31. Defendant, arbitrarily and wrongfully and without warrant of law, and in breach of its representation to the plaintiff, and after having duly made its Determination that plaintiff is entitled to full payment of its claim under the Act, which Determination of defendant is still in effect, has both denied plaintiff a license to permit plaintiff to enforce his just claim and has refused to administer the frozen property of United in accordance with the Act and thereby has prevented plaintiff from recovering in accordance with the defendant's aforesaid Determination of plaintiff's rights.

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32. Plaintiff, by his attorneys, has had many conferences with agents and assistants of the defendant in a fruitless effort to convince defendant to change his position. Plaintiff has exhausted his administrative remedy without any success.

33. WHEREFORE, plaintiff respectfully prays this Court for an Order that defendant must at his election either issue a license to the plaintiff authorizing the satisfaction and payment of his judgment against United or vest the property blocked in the name of United and pay and satisfy plaintiff's judgment against United in accord-

ance with the aforesaid Determination and Representation of the Defendant.

COBB AND WEISSBRODT
1822 Jefferson Place
Washington, D. C.
/s/ David Cobb
By: DAVID COBB
Attorneys for Plaintiff

PAUL ABRAMS
393 Seventh Avenue
New York City
Of Counsel.

7 Filed May 28 1952 Harry M. Hull, Clerk

Exhibit "A"

DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY

In the Matter of the Estate of

United Incandescent Lamps & Electrical Co., Ltd.
Vesting Orders 27, 112, 201, and 4220

Account No. 34-630

Schedule

After making such deductions and establishing such reserves as are required by section 34(d) of the Trading with the Enemy Act, as amended, the sum of $29,965.88 is available for the payment of debt claims filed in respect of the above insolvent debtor's estate. I propose to allow the following claims and to make the following payments; subject to any decrease resulting from the administration of the debtor's account prior to payment.

1. WAGE AND SALARY CLAIMS NOT EXCEEDING $600.00

Claim No.	Name of Claimant	Address	Nature of claim	Sum Allowed	Proposed Payment
11,354	Dr. Jacques Codray	119 W. 71st St. New York City	Salary	$600.00	$600.00

2. CLAIMS ENTITLED TO PRIORITY UNDER SECTIONS 191 and 193 of U.S.C.

Claim No.	Name of Claimant	Address	Nature of Claim	Sum Allowed	Proposed Payment
NONE					

3. ALL OTHER CLAIMS FOR SERVICES RENDERED, FOR EXPENSES INCURRED IN CONNECTION WITH SUCH SERVICES FOR RENT, FOR GOODS AND MATERIALS DELIVERED TO THE DEBTOR, AND FOR PAYMENTS MADE TO THE DEBTOR FOR GOODS OR SERVICES NOT RECEIVED BY CLAIMANT.

Claim No.	Name of Claimant	Address	Nature of Claim	Sum Allowed	Proposed Payment
11354	Jacques Codray	119 W. 71st St. New York City	Salary and bonuses	$23,400.00	$23,400.00

4. ALL OTHER DEBT CLAIMS

Claim No.	Name of Claimant	Address	Nature of Claim	Sum Allowed	Proposed Payment
2474	Wells Fargo Bank & Union Trust Co.	San Francisco, California	Money advanced	$10,049.39	$1,405.05
11354	Jacques Codray	119 W. 71st St. New York City	Sale of stock	$32,620.50	$4,560.83

(Signed) Harold I. Baynton
Harold I. Baynton
Acting Director
Office of Alien Property

June 27 1950

8 Filed May 28 1952 Harry M. Hull, Clerk

Exhibit "A"

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF ALIEN PROPERTY

In the Matter of the Claims of:

WELLS FARGO BANK & UNION TRUST CO.

and

JACQUES CODRAY

Debt Claims Nos. 2474 and 11354

DETERMINATION

Statement of the Claims

These are two debt claims under section 34 of the Trading with the Enemy Act, as amended, for the payment of the sums of $10,049.39 and $56,620.50, respectively, asserted by the Wells Fargo Bank & Union Trust Company, San Francisco, California, and by Dr. Jacques Codray, 119 West 71st Street, New York City, with respect to the United Incandescent Lamps & Electrical Co., Ltd., (hereinafter referred to as "United"). These matters have been submitted to me for determination upon recommendation for allowance by the Chief, Claims Branch, pursuant to sections 502.204 and 502.202 of the Rules of Procedure for Claims.

Upon the basis of the reports of investigation, the representations made by the claimants in the claim forms, exhibits and other documents of record, I make the following findings of fact and conclusions of law:

1. Eligibility of the Claimants—Section 34(a)

The claimants, the Wells Fargo Bank & Union Trust Co., a corporation incorporated under the laws of the

State of California, and Dr. Jacques Codray, a citizen and resident of the United States, are eligible debt claimants under section 34(a) of the Trading with the Enemy Act, as amended.

2. Validity of the Claims—Section 34(a)

Claim No. 2474 is based on a debt arising from Wells Fargo Bank & Union Trust Company's participation in the extension of dollar credits to "United" pursuant to the Hungarian Export Agreement dated December 19, 1928. The amount of this claim, i.e., $10,049.39, represents a loan made in 1931, which was renewed from time to time, pursuant to the Hungarian-American Standstill Agreements, until October 15, 1941, when the Hungarian-American Standstill Agreement of 1941 expired.
9 No payment has been made on the principal amount of this loan.

Claim No. 11,354 is based on a debt arising from unpaid salary and bonuses in the amount of $84,000.00, and from the sale of stock in the Tungaram Co., a subsidiary of "United," to "United" by Dr. Jacques Codray for $32,620.50. The salary and bonuses were earned as of June 1940, and the sale of stock took place between December 1940 and June 1941.

The indebtedness did not arise from any action or transactions prohibited by the Trading with the Enemy Act. The claims are based on debts due and owing to the claimants by the debtor immediately prior to the vesting of the debtor's property. There are no defenses to the payment of the claims.

3. Availability of the Debtor's Estate—Sections 34(d), 36

Certain property of the debtor, United Incandescent Lamps & Electrical Co., Ltd., was vested in the Alien

Property Custodian on June 22, 1942, September 1, 1942, December 23, 1942, and October 23, 1944, by virtue of Vesting Orders Nos. 27, 112, 201, and 4220 respectively. According to the records of the Comptroller of the Office of Alien Property, as of February 15, 1950, the debtor's estate comprises cash in the amount of $37,457.35. The subject debt claims are the only debt claims outstanding against this estate and there are no title suits or claims for return pending with respect to the vested property. Pursuant to sections 34(d) and 36 of the Trading with the Enemy Act, the Comptroller will reserve the sum of $7,491.47 for the discharge of allowable tax claims, if any, and for the expenses of the Office of Alien Property in connection with the vested property. The sum of $29,965.88 will then be available for the payment of outstanding debt claims.

4. Attorney's Fees—Section 20

In Claim No. 2474, the claimant asserts that the law firm of White & Case, 14 Wall Street, New York, New York, is to receive $500.00 for services rendered by the firm in connection with the prosecution of this claim, but in no event shall White & Case receive more than 10% of the amount paid on this claim. Upon the basis of the entire record, it is concluded that a fee of $500.00, which is less than 5% of the entire amount claimed, is fair compensation for the services rendered to the claimant in the prosecution of its claim with this Office.
10 However, in view of the fact that only $1,405.05 is presently available in the debtor's account for the payment of this claim, the fee herein allowable is $140.50, or, in no event, more than 10% of the payment to be made on this claim should the amount presently available for the payment of debt claims be decreased as the result of the administration of the debtor's account prior to pay-

ment. Should any future payments be made on this claim to the claimant by this Office, counsel is entitled to receive 10% of each such payment until its total fee of $500.00 is paid.

In Claim No. 11,354, the claimant asserts that Paul Abrams, 393 Seventh Avenue, New York, New York, and the law firm of Cobb and Weissbrodt, 1822 Jefferson Place, N.W., Washington, D. C., are each to receive a fee of $1500.00, totalling $3,000.00, for services rendered in connection with the prosecution of this claim, but in no event shall fees totalling more than 10% of the amount on this claim be paid to counsel. Upon the basis of the entire record, it is concluded that fees totalling $3,000.00, which are less than 6% of the entire amount claimed, are fair compensation for the services rendered to the claimant in the prosecution of his claim with this Office. However, in view of the fact that only $28,560.83 is presently available in the debtor's account for the payment of this claim, the total fee herein allowable is $2,856.08, or in no event, more than 10% of the payment to be made on this claim should the amount presently available for the payment of debt claims be decreased as the result of the administration of the debtor's account prior to payment. Should any future payments be made on this claim to the claimant by this Office, counsel are entitled to receive 10% of each such payment until their total fee of $3,000.00 is paid.

Upon the basis of the foregoing findings of conclusions, it is determined that the applicable provisions of sections 34 and 20 of the Trading with the Enemy Act, as amended, are satisfied, and Claim No. 2474 of the Wells Fargo Bank & Union Trust Co., in the amount of $10,049.39, and claim No. 11,354 of Dr. Jacques Codray, in the

amount of $56,620.50, are hereby allowed. Claim No. 2474, based on a loan of money, is assigned to category (4) in accordance with the provisions of sections 34(f) and (g) of the Trading with the Enemy Act, as
11 amended, and Claim No. 11,354, based on salary, bonuses, and the sale of stock, is assigned $600.00 in priority category (1), $23,400.00 in priority category (3), and $32,620.50 in category (4). Section 34(g) provides that no payments shall be made to claimants within a subordinate class unless the money available for the payment of claims permits payment in full of all allowed claims in every prior class. Accordingly, the sum of $29,965.88, the total amount available in the debtor's estate for the payment of claims, is hereby ordered to be paid to the claimants as follows, subject to any decrease resulting from the administration of the debtor's account prior to payment:

Claim No.	Claimant	Amount
2474	Wells Fargo Bank & Union Trust Co.	$ 1,405.05
11,354	Dr. Jacques Codray	28,560.83

(Signed) Harold I. Baynton
Harold I. Baynton
Acting Director
Office of Alien Property

June 27 1950

12 Filed May 28 1952 Harry M. Hull, Clerk

Exhibit "B"

In reply please refer to file number JS:SE:MPC:et

OFFICE OF ALIEN PROPERTY
Department of Justice
Washington 25, D. C.

June 28, 1950

Cobb and Weissbrodt
Attorneys at Law
1822 Jefferson Place, N. W.
Washington 6, D. C.

Re: *Jacques Codray*

Gentlemen:

I take pleasure in enclosing, for your information, a copy of a Determination allowing the above-numbered debt claim in the amount of $56,620.50, asserted with respect to United Incandescent Lamps & Electrical Co., Ltd., property of which has been vested by this Office. Payment of the sum of $28,560.83 will be made in due course, subject to any decrease resulting from the administration of the debtor's account prior to payment.

If additional cash should become available in debtor's account, supplementary payment on this allowed claim could then be made to Dr. Jacques Codray.

Sincerely yours,

(s) Harold I. Baynton
Harold I. Baynton
Acting Director
Office of Alien Property

Enclosure

cc: Mr. Paul Abrams
393 Seventh Avenue
New York, New York
Dr. Jacques Codray
119 West 71st Street
New York, New York

13 Filed May 28 1952 Harry M. Hull, Clerk

Exhibit "C"

At a Special Term Part 2 of the Supreme Court of the State of New York, held in and for the County of New York, at the courthouse, Center and Pearl Streets, in the Borough of Manhattan, City and State of New York, on the 2nd day of May, 1952.

PRESENT:

HONORABLE Denis O'L Cohalan, Justice.

JACQUES CODRAY,

Plaintiff,

—against—

UNITED INCANDESCENT LAMP & ELECTRICAL CO. LTD.

Defendant.

Index #410/1951

On reading and filing the affidavit of Paul Abrams, sworn to the 22nd day of April, 1952, and the depositions of Jacques Codray and Paul Abrams, sworn to on the 15th day of April, 1952, before Honorable Mr. Justice Denis O'L'Cohalan; and upon the papers and proceedings heretofore filed herein, from which it appears that the defendant in the above-entitled action is a non-resident foreign corporation, being a corporation duly incorporated and organized, and currently existing under the laws of Hungary; and that, pursuant to an order of this Court of Honorable Mr. Justice Louis A. Valente dated the 22nd day of January, 1951, the summons was served on the said defendant by publication, and that on the 6th day of March, 1951, said service was completely made; and that the affidavits of publication, adducing to the pub-

lication, as per the order, in the New York Law Journal and Il Progresso, were duly filed in the Office of the County Clerk, New York County; and that more than twenty days have elapsed since said date, and that the defendant corporation has not appeared, answered or raised any objection to the complaint in point of law in said action; and that the said defendant corporation is now in default; and that the action herein is upon two causes of action for the breach of two separate and express contracts (other than contracts to marry) and that judgment is sought therein for a sum of money only; and that a warrant of attachment duly granted in this

14 action by Honorable Mr. Justice Louis A. Valente, dated January 9th, 1951, has been levied by the Sheriff of the County of New York on certain property of the defendant corporation, containing a description of the property so attached, and that a statement of the value thereof according to the inventory has been made by the said Sheriff; and it affirmatively appearing that the Sheriff has attached 13,500 (thirteen thousand five hundred) shares of stock of the International Telephone & Telegraph Corp., of a current market value in excess of $200,000., and the additional sum of $7,134.47 in cash; and the plaintiff Jacques Codray and the plaintiff's attorney, Paul Abrams, having been duly examined on oath respecting any payments that may have been made to the plaintiff, or to any one for his use, on account of his demand as against the defendant; and the Court having found that no payments had been made to the plaintiff upon his demands as against the defendant except the sum of $28,560.83 paid on September 8th, 1950, by the Department of Justice, Office of Alien Property from funds belonging to the defendant, seized and vested by the said Office of Alien Property; and that the plaintiff

is entitled to recover from the defendant unpaid principal in the sum of $28,059.69, with interest thereon at the rate of 6% (six per centum) per annum, from June 1st, 1941 to April 15, 1952, amounting to the sum of $18,308.92; and interest on the sum of $28,560.83 from June 1st, 1941 to September 8th, 1950, at which date (September 8th, 1950) the said sum of $28,560.83 was paid, at the rate of six per cent per annum, amounting to the sum of $15,-851.25; and that the plaintiff is therefore entitled to recover from the defendant corporation the gross sum of $62,219.86 over and above all counterclaims known to the plaintiff;

NOW, on motion of Paul Abrams, attorney for the plaintiff, it is

ORDERED that judgment be entered herein providing that the plaintiff Jacques Codray recover of the defendant United Incandescent Lamp & Electrical Co. of Ujpest, Hungary, a Hungarian corporation, the sum of $28,059.69, as principal, and the total sum of $34,160.57, as interest, making a total of $62,219.86, together with the costs of this action to be taxed by the Clerk of this Court, and that the plaintiff Jacques Codray have execution therefor.

enter.

(s) D. O'L C.
J.S.C.

Filed May 2, 1952

New York
County Clerk's Office.

15 Filed May 28 1952 Harry M. Hull, Clerk

Exhibit "D"

HGH:MW:PG:mw F-63-12537 NY 869754

DEPARTMENT OF JUSTICE
Office of Alien Property
Washington 25, D. C.

April 4, 1952

Mr. Jacques Codray
c/o Mr. Paul Abrams
393 Seventh Avenue
New York, New York

Dear Sir:

With reference to your application dated January 22, 1951 (our No. NY 869754) for a license, you are advised that the application is denied for the reason that it involves property in which there is a Hungarian interest, the disposition of which is subject to determination of over-all governmental policy.

Very truly yours,
Harold I. Baynton

Assistant Attorney General
Director, Office of Alien Property
By (s) Henry G. Hilken
Henry G. Hilken, Chief
Intercustodial & Property Branch

16 Filed May 28 1952 Harry M. Hull, Clerk

Exhibit "E"

DEPARTMENT OF JUSTICE

Office of Alien Property
Washington 25, D. C.

HGH:MW:PQ:mw

F-63-12537

128669

April 30, 1952

Paul Abrams, Esq.
393 Seventh Ave.
New York, N. Y.

Dear Mr. Abrams:

Re: Application No. NY 869754

Reference is made to your letter dated April 16, 1952 requesting a reconsideration of our denial of application No. NY 869754 which you filed in behalf of Jacques Codray for a license authorizing the transfer to the Sheriff of the City of New York, New York County Division, of certain property held in the name of United Incandescent Lamps & Electrical Co. Ltd. and subject to a Warrant of Attachment.

You are advised that the application must again be denied for the same reason we gave you under date of April 4, 1952, i.e. that the application involves property in which there is a Hungarian interest, the disposition of which is subject to determination of over-all governmental policy. In this connection, your attention is directed to the provisions of the treaty of peace with Hungary which recog-

nized that such disposition would be made by the United States Government.

Very truly yours,

Harold I. Baynton
Assistant Attorney General
Director, Office of Alien Property

By: HENRY G. HILKEN,
Henry G. Hilken, Chief
Intercustodial and Property Branch

* * * *

17 Filed Jul 25 1952 Harry M. Hull, Clerk

Defendant's Motion to Dismiss or for Summary Judgment

The defendant, on the allegations of the complaint and on the affidavits of Henry G. Hilken and Walworth Barbour, attached hereto and marked respectively Exhibits 1 and 2, moves to dismiss the Complaint or, in the alternative, for summary judgment for the defendant on the grounds that:

1. This is an action against the United States and the United States has not consented to be sued;

2. The Court lacks jurisdiction over the subject matter of the action;

3. The complaint fails to state a claim upon which relief can be granted.

/s/ Rowland F. Kirks
Rowland F. Kirks
Special Assistant to the
Attorney General
Acting Director,
Office of Alien Property

/s/ James D. Hill
James D. Hill

/s/ George B. Searls
George B. Searls

/s/ John F. Cushman
John F. Cushman
Attorneys, Department of Justice
Washington 25, D. C.

July 25, 1952

* * * *

Exhibit 1

18 Filed Jul 25 1952 Harry M. Hull, Clerk

Affidavit of Henry G. Hilken

Henry G. Hilken, being duly sworn, deposes and says:

I am Chief of the Intercustodial and Property Branch of the Office of Alien Property, Department of Justice, which includes the Foreign Funds Section, which is charged with the duty of passing upon applications for licenses under Executive Order 8389, as amended. I make the statements in this affidavit of my personal knowledge.

As Chief of the Intercustodial and Property Branch of the Office, I have under my charge the administration of the "foreign funds controls", including the granting and denying of licenses for transactions in "blocked" Hungarian assets in the United States. By virtue of my official position and my duties with respect to such matters, I am advised of and am familiar with the policies followed in the administration of those controls, and with the discussions carried on by members of the Office of Alien Property with representatives of the Department of State in regard to those controls.

During the past 4 years the Office has been advised by the Department of State that in the opinion of that Department the continued control under Executive Order No. 8389 of "blocked" Hungarian assets was important to the conduct of the foreign policy of the United States because Hungary has failed to make adequate provision for the satisfaction of the claims of American nationals under the Treaty of Peace with Hungary and otherwise, including claims for restoration of property and other "war damage" claims, pre-war debts, and claims for
19 compensation for the nationalization by the present Government of Hungary of property interests of Americans. I know, from information received from the Department of State and from my own examination of the records of the Office, that in dollar value the amount of "blocked" Hungarian assets is only a fraction of the amount of the claims of Americans for war damages, debts, and nationalizations. The Department of State has advised the Office of its opinion that the licensing of payment of creditors' claims might leave nothing for nationalization and other claimants, that it is desirable that the depletion of such assets should not be permitted while there is doubt about the proper implementation by Hungary of the Treaty of Peace, and that the status quo of such assets should be preserved. Accordingly, because of the provisions of the Treaty of Peace and the advices received from the Department of State, and in the exercise of the discretion of the Attorney General, acting through the Office of Alien Property, in administering the controls, the Hungarian assets in question have been kept "blocked" and it is the policy of the Office of Alien Property to deny licenses for the payment of creditors' claims out of such assets.

One consideration which has been taken into account in forming and applying that policy is that at the present time no procedures have been established for the appli-

cation of such blocked assets to war damage and nationalization claims, and until such procedures are established, by legislation or executive order, or both, there is no method by which such classes of claimants can be paid out of the "blocked" assets, although under the Treaty of Peace the United States is authorized to seize such assets and apply them or their proceeds in satisfaction of such claims of its nationals.

For these reasons, and taking into account the opinions of the Department of State, which is charged with the conduct of the foreign affairs of the United States, it has been since a date prior to January 1, 1951, and now is, the policy of the Office of Alien Property to deny applications for licenses for payments out of "blocked" Hungarian assets, except in a few exceptional classes of cases, such as the release to the owners when those owners are persecuted refugees from Hungary until an
20 over-all governmental policy is worked out for the disposition of such assets among all classes of claimants in such fashion as Congress or the President may decide. It was pursuant to this policy that the license application of Dr. Jacques Codray was denied.

/s/ Henry G. Hilken

Subscribed and sworn to before
me this 21st day of July, 1952.

/s/ Josephine A. Sterling
Notary Public

• • • •

Exhibit 2

21 Filed Jul 25 1952 Harry M. Hull, Clerk

Affidavit of Walworth Barbour

Walworth Barbour, being duly sworn, deposes and says: I am the Director of the Office of Eastern European Affairs. I am responsible, under the direction of the Assistant Secretary of State for European Affairs, for the development and carrying out of foreign policy with respect to Hungary.

During the past four years the State Department has consulted and advised with the Office of Alien Property, Department of Justice, in regard to the treatment to be given to the "blocked" assets in the United States of the Government of Hungary and of the nationals of that country. During such period of four years the Department of State has represented to the Office of Alien Property that the continued control of the Hungarian assets "blocked" under Executive Order No. 8389, as amended, is important to the conduct of the foreign relations of the United States, and that, for that reason, such assets should be kept in status quo until a general governmental policy should be worked out as to the disposition of those assets. The representations to that effect have been based upon the following facts and considerations, all of which have been the subjects of discussions between representatives of the Department of State and the representatives of the Office of Alien Property.

22 Under Article 26 of the Treaty of Peace concluded with Hungary in 1947 by the United States and other Allied and Associated Powers, the Government of Hungary agreed to restore to nationals of the United States their property in Hungary as it existed on September 1, 1939, free of all encumbrances and charges to which it might have become subject as a result of the

war, and to compensate them for loss by reason of injury or damage to their property in Hungary. By Article 31 of the Treaty it was agreed that the existence of a state of war should not be regarded as having affected obligations to pay debts arising out of obligations which existed before the state of war, and by Article 29 of the Treaty it was agreed that the United States should have the right to seize, retain, liquidate or take any other action with respect to, all property, rights, and interests within its territory and belonging to Hungary or to Hungarian nationals, and to apply such property or the proceeds thereof to such purposes as it might desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts, other than claims fully satisfied under other Articles of the Treaty. By paragraph 5 of Article 29 the property subject to said Article was defined to include property which had been subject to control by reason of the state of war.

Since the effective date of the Treaty the Government of Hungary has failed to carry out its obligations mentioned above, and to make any provision for payment of compensation to Americans on the claims described in the Treaty. Furthermore, during the same period the Government of Hungary has embarked on a program of nationalization of banks, corporations, and business enterprises, as a result of which many Americans have suffered very substantial losses for which no compensation has 23 been paid. For several years the Department of State has attempted to secure from the Hungarian Government implementation of the treaty obligations, as well as compensation for any acts of nationalization. It has now been clear for some time that no success along these lines is to be expected. Accordingly, consideration is now being given to other means for the indemnification of American claimants.

According to the information available to the Department of State the claims of Americans against Hungary, including war damage claims, debts, and nationalization claims, far exceed in amount the value of the Hungarian assets now "blocked" under Executive Order No. 8389, as amended, so that the interpretation and application of Article 29 of the Treaty presents a problem in equitable distribution or allocation. Thus, there is a problem of a difference of treatment for different categories of creditors, dependent on the time of presenting claim, as well as the relative priorities to be established between creditors on the one hand and claimants for war damage and nationalization on the other hand, either generally or for particular situations. In addition, there is the question of what assets should be vested and whether there should be a difference of treatment dependent on whether the assets are owned by the Hungarian Government or private individuals and, if by the latter, whether any difference of treatment should be accorded dependent on the presence of the individual outside of Hungary and his political attitudes.

The Office of Alien Property has advised the Department of State that there is some doubt as to the adequacy of existing legislation to deal with this situation, particularly with respect to compensation for war damages and nationalization. In view of this and the other aspects indicated above, the Department of State and the Office of Alien Property have been discussing and

24 are now contemplating the submission to Congress of a request for legislation that would provide a scheme for distribution of such assets among the several classes of American claimants and clarify the situation as to the method of seizing those assets. The Department of State has represented to the Office of Alien Property, and to the Attorney General, that in its opinion, until the proposed program for clarifying and extending the law relating to these matters can be worked out and effectu-

ated, it would aid in the conduct of the foreign relations of the United States and the implementation of the Articles of the Treaty to keep the Hungarian assets in question "blocked" and not to license diminution thereof, except as presently authorized.

The foregoing statements are known to me to be true to my own knowledge, or in some cases where not so known to me, are stated to be true upon information and belief based on material in the files of the Department of State.

/s/ Walworth Barbour
Walworth Barbour

Subscribed and sworn to before me this
23d day of July, 1952.

/s/ Frances Jean Espe
Notary Public
District of Columbia

My Commission expires March 31, 1957.

* * * *

25 Filed Sep 5 1952 Harry M. Hull, Clerk

Plaintiff's Motion For Summary Judgment

The plaintiff, on the basis of the pleadings herein and the affidavits annexed to the motion of the defendant to dismiss or for summary judgment, respectfully moves the Court for summary judgment for the reasons stated in plaintiff's memorandum of points and authorities submitted herewith in support of plaintiff's motion.

Respectfully submitted:

COBB AND WEISSBRODT
1822 Jefferson Place, N.W.
Washington 6, D. C.
By: /s/ David Cobb
David Cobb
/s/ I. S. Weissbrodt
I. S. Weissbrodt

* * * *

26 Filed Nov 7 1952 Harry M. Hull, Clerk

Memorandum Opinion

Defendant's motion for summary judgment granted.

In the view this Court takes of the matter this litigation is essentially a suit against the sovereign who has not consented to be sued. The rule is well established certainly by now that when the United States permits itself to be sued in its own Courts, the terms of the permission must be strictly followed and complied with. It is the United States that is being sought to be coerced into a course of action it has indicated it does not desire under the circumstances to posit. What the plaintiff is seeking is a license which the Government for reasons made clear is undesirous of granting, or to compel the Government to vest the property in question so as to bring the matter thus within the terms of the statute. No matter how viewed, the coercive power of the Court is sought against the sovereign.

Apart from that, the Court questions the right of the plaintiff generally in the circumstances.

He has no such interest in the property in question as to enable him to question the propriety of the Government's action, for such it is in essence. What has he got? He is a judgment creditor under New York law—and the only way in which his judgment can be satisfied

27 is from the attached property. In other words, he has not title but a lien which remains alive until such time as the judgment has been paid. His judgment is valid but execution which would require a federal license cannot be had because the Government has refused to issue one. Or, as Mr. Justice Jackson observed in Zittman v. McGrath, 341 U.S. 446 at 451, "Under state law, the position of these judgment creditors is that they

have judgments secured by attachments . . ." on foreign funds ". . . good as against the debtors but subject to a federal licensing before they can be satisfied by transfer of title or possession." This is all he has. As a consequence there is no unwarrantable interference with the property of the plaintiff and, therefore, the case does not fall within that group of cases (of which Philadelphia Company v. Stimson, 223 U.S. 605 is the leading one) wherein resort to equity for the protection of a property right was not to be defeated on the ground that the suit is one against the United States. The action of the officer in question is perfectly legal and discretionary.

The other questions raised are unimportant as the suit must fail for the reasons stated. Order accordingly.

/s/ Matthew F. McGuire
Matthew F. McGuire
United States District Judge

November 7, 1952

* * * *

28 Filed Nov 14 1952 Harry M. Hull, Clerk

Judgment

This action came on to be heard on the Defendant's Motion to Dismiss or for Summary Judgment and on Plaintiff's Motion for Summary Judgment and was argued by counsel, and, due consideration thereof having been had, it is hereby

ORDERED, ADJUDGED and DECREED that Plaintiff's Motion be and hereby is denied and that Defendant's Motion for Summary Judgment be and hereby is granted and that judgment be and hereby is entered for the defendant.

/s/ Matthew F. McGuire
United States District Judge

November 14, 1952

* * * *

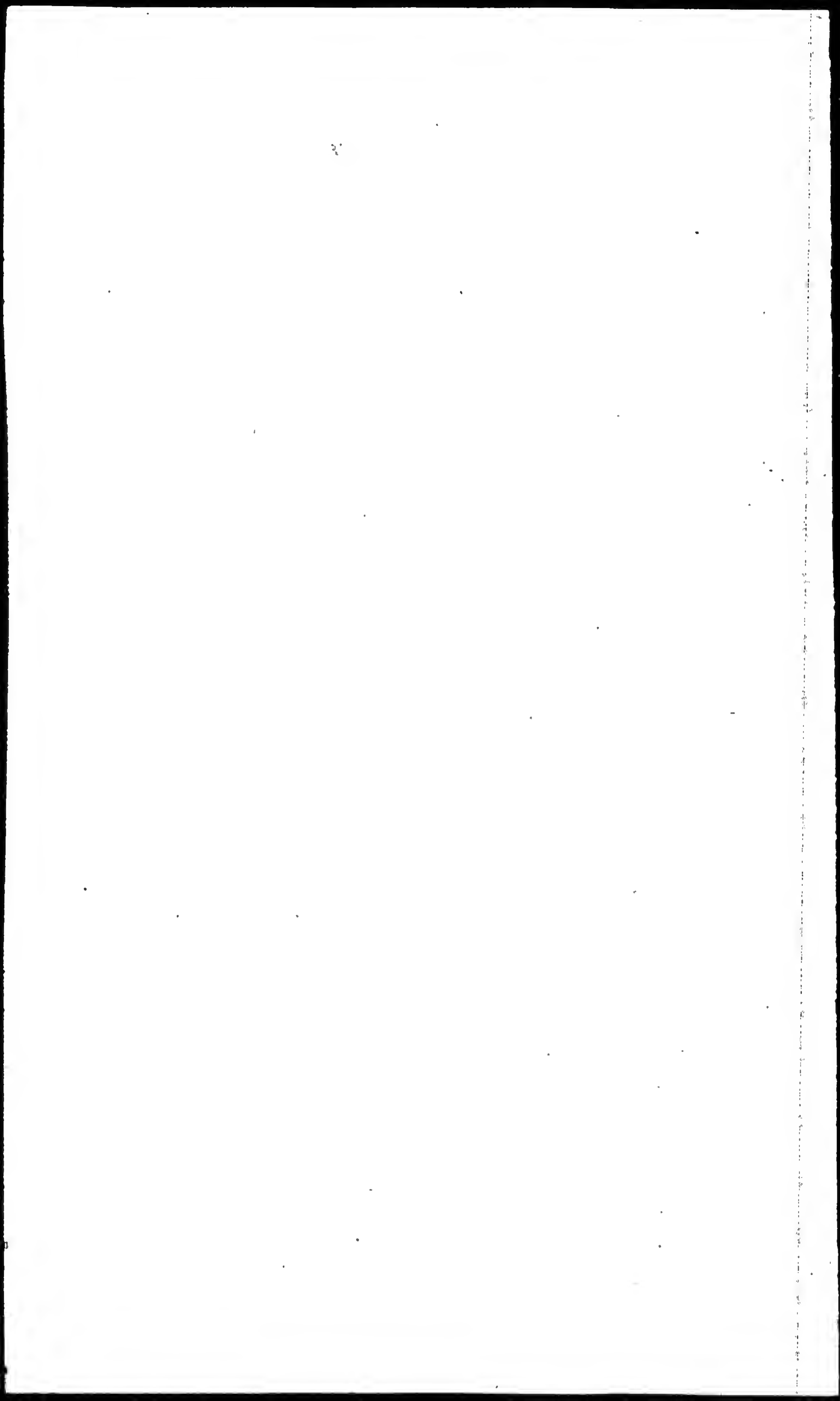
29 Filed Dec 4 1952 Harry M. Hull, Clerk

Notice of Appeal To United States Court of Appeals Under Rule 73 (b)

Notice is hereby given that Jacques Codray, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia from the Judgment Order of Judge Matthew McGuire entered in the action on November 14, 1952.

COBB AND WEISSBRODT
1822 Jefferson Place N.W.
Washington 6, D. C.

By: /s/ David Cobb
David Cobb
Attorney for appellant
Jacques Codray



No. 11,641

APPELLANT'S BRIEF AND SUPPLEMENT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the District of Columbia Circuit
FILED JAN 26 1953
Joseph W. Stewart
CLERK

JACQUES CODRAY, *Appellant*,

v.

Herbert Brownell, Jr. ~~JAMES P. MCGRANERY~~, Attorney General and Successor to the Alien Property Custodian, *Appellee*.

Appeal from Final Order of United States District Court for the District of Columbia

COBB AND WEISSBRODT
1822 Jefferson Place, N. W.
Washington 6, D. C.

By:
DAVID COBB
I. S. WEISSBRODT

PAUL ABRAMS
393 Seventh Avenue
New York, New York
Attorneys for Appellant

WILSON - EPES PRINTING CO. - RE 7-6003 - WASHINGTON 1, D. C.

No. 11,641

QUESTIONS PRESENTED

1. After the appellant's right to be paid a bona fide prewar debt claim out of certain Hungarian enemy assets captured during World War II under the Trading with the Enemy Act has been determined in his favor by an adjudication under Section 34 of the Act and by an *in rem* judgment and attachment of a New York State court, has the appellee any countervailing authority under the Act to defeat appellant's right to be paid by holding the enemy assets "blocked" *both against* execution of the New York State court judgment *and against* administration pursuant to Section 34 of the Act?

2. Assuming the appellee is unlawfully "blocking" payment of appellant's claim, did the District Court have jurisdiction to order the appellee to cease and desist from his unlawful blocking and thereby, in effect, direct that the appellee shall at his own election either license the payment of appellant's claim out of the "blocked" assets or seize and administer the assets pursuant to Section 34 of the Act?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,641

JACQUES CODRAY, *Appellant,*

v.

JAMES P. MCGRANERY, Attorney General and Successor to the Alien Property Custodian, *Appellee.*

Appeal from Final Order of United States District Court for the District of Columbia

---

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The complaint asserts that the appellee, "arbitrarily and wrongfully and without warrant of law", is blocking payment of a debt claim out of certain Hungarian enemy assets. App. p. 8. The action rests upon appellee's violation of the Trading with the Enemy Act, as amended, 40 Stat. 411, U.S.C.A., Title 50, App., §§ 1 *et seq.* (hereinafter called the Act), and his violation of the Fifth Amendment to the Constitution of the United States. App. pp. 2-3. The jurisdiction of the United States Dis-

trict Court for the District of Columbia is sustained by U.S.C.A., Title 28, § 1331; Title 11 District of Columbia Code, §§ 301, 306; and by the Declaratory Judgment Act, 62 Stat. 964, U.S.C.A., Title 28, §§ 2201 and 2202. The case is before this Court on appeal from a final order of the United States District Court for the District of Columbia which denied a motion by the appellant, the plaintiff below, for summary judgment, and granted a motion of the appellee, the defendant below, for summary judgment. U.S.C.A., Title 28, § 1291.

STATEMENT OF THE CASE

Appellant is an American citizen. United Incandescent Lamp & Electrical Company (herein called "United") is a Hungarian corporation which, before March 13, 1941, owed to the appellant $56,620.50, exclusive of interest.

On March 13, 1941, the President blocked all assets of Hungarian nationals located in the United States. (Executive Order No. 8711, 6 F.R. 1443.) This blocking order applied to all the property of United in this country. So far as is *now* known to the appellant, the assets of United that were blocked by this Order were the following:

Item	*Property*	*Location*	*Market Value (Approximate)*
(1)	Debt owing to United by National and Transcontinental Trading Corp. (hereinafter called "Transcontinental"), a New York Corporation *largely owned by appellant*	In accounts of Transcontinental	$37,000
(2)	13,500 shares common stock, International Telephone & Telegraph Corporation	Held by J. P. Morgan Co. of New York City for United	$200,000
(3)	Cash	Balance in account held by Guaranty Trust Co., New York City, due United	$7,000

With the entry of our country into the War on December 7, 1941, the authority conferred upon the President to seize, hereinafter sometimes called "vest", enemy property under the Act came into full force and effect. The President delegated this vesting authority in full to the Secretary of the Treasury[1] and, thereafter, further delegated the authority, in part, to the Office of Alien Property Custodian.[2] Pursuant to this further delegation, the Office of Alien Property proceeded to vest all enemy property placed under its control. By Vesting Order No. 4220 issued on October 14, 1944, the Alien Property Custodian vested money owed to United by Transcontinental, item (1) above, a sum of $37,457.35.[3]

While it was the policy of the Office of Alien Property Custodian to vest all enemy property under its control, the Treasury Department adopted a policy of holding its enemy property *blocked*. The only apparent reason for this divergent policy is to be found in the fact that, by Presidential delegation, the administration of *vested* property fell under the jurisdiction of the Alien Property Custodian.[4] The administration of *blocked* property, by general and special licenses, continued under the jurisdiction of the Treasury Department. By reason of the

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[1] Memorandum from the President to the Secretary of the Treasury, dated February 12, 1942. 7 F.R. 1409.

[2] Executive Order No. 9095, dated March 11, 1942, 7 F.R. 1941, with amendments.

[3] The debt owed by Transcontinental to United was *not* the type of *business* asset placed under the control of the Alien Property Custodian by the Presidential delegation. However, the executive order making this division of authority between the Treasury Department and the Alien Property Custodian provides that no third person may challenge the authority of the one, for exercising the authority of the other. The appellant does not challenge the validity of these vestings.

[4] By Executive Order No. 9788, dated October 14, 1946, 11 F.R. 11981, the Office of Alien Property Custodian was terminated, and its functions transferred to the appellee.

"blocking" policy adopted by the Treasury Department, the remaining items of United property, namely Item (2) above, held in the custody of J. P. Morgan & Co., and Item (3) above, held by Guaranty Trust Co. continued *blocked* under Treasury Department control and were never vested.

On August 8, 1946, the Act was amended by the addition of Section 34. This Section 34 established a *revised* procedure for payment of American creditors holding prewar debt claims against vested property.[5] A statutory period for filing such claims was provided in the Act, and before the close of that statutory period, two claims were filed under the Act against the vested United property—one, filed by the appellant, and the other, filed by Wells Fargo Union Bank & Trust Co.

Effective September 15, 1947, the United States entered into a Treaty of Peace with Hungary, 62 Stat., Part 2, 2109, and in this Treaty it was provided that Hungarian assets located in this country "at the coming into force of" the Treaty would be taken by the United States Government, and used to pay the debts of Hungarian nationals to United States citizens, and for other purposes in accordance with the laws of this country.[6]

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[5] For the earlier procedure, see *White* v. *Mechanics Securities Corporation,* 269 U.S. 283 (1925).

[6] The assets of Hungarian nationals that have come into this country since the Treaty are non-enemy foreign assets, and have been licensed. This case is concerned only with *enemy* Hungarian assets, that is, assets of Hungarian nationals *caught in this country during the war* and declared by the Treaty of Peace to be still subject to seizure by our Government. The status of *non enemy* Hungarian assets—that is, assets of Hungarian nationals that have come into this country after the war—is not in issue in this case. Non enemy Hungarian assets are currently allowed by our Government to be transferred freely under a general license applicable to the assets of friendly foreign nationals. General License No. 94, issued December 7, 1945, 10 F.R. 14814, and accompanying Press Release No. 76 of the same date.

Following the ratification of this treaty, and under date of January 16, 1948, the Treasury Department announced that it would grant licenses to permit payments to American creditors of Hungarian business interests with blocked assets in this country. Treasury Department Press Release No. s-599, January 16, 1948. (Supplement to the Brief, p. 53) In taking this step, the Treasury Department was applying to its unblocking procedures the principles contained in Section 34 of the Act. The appellant, however, not then aware of the existence of United assets *blocked* by the Treasury Department, did not file a license application.

Instead, the appellant pressed his claim against the *vested* assets of United under Section 34 of the Act. In due course the Office of Alien Property adjudicated, under Section 34, the claims of the appellant and of the Wells Fargo Union Bank and Trust Co. against the United *vested* property.[7] Under date of June 27, 1950, the Acting Director of the Office of Alien Property[8] made his determination. He found that the debt claim of the appellant against United in the amount of $56,620.50, exclusive of interest, was an allowable claim pursuant to Section 34 of the Act. Also, he found that the debt claim of the Wells Fargo Union Bank & Trust Co. was an allowable claim in the amount of $10,049.39. Since these debt claims exceeded the $37,475.35 of United property that had been *vested,* the vested estate of United was thereafter distributed in accordance with the terms of

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[7] By Executive Order No. 9989, effective September 30, 1948, jurisdiction over all remaining *blocked* assets was transferred from the Treasury Department to the Attorney General. Accordingly, the Attorney General at the time of this adjudication had authority and continues now to have authority over both the "blocked" and "vested" assets of United.

[8] He acted under a subdelegation of power from the Attorney General.

the Act as follows:

To the Government for its administration of the estate	$7,491.47
To the appellant	28,560.83
To Wells Fargo Union Bank and Trust Co.	1,405.05

Accompanying his determination, the Acting Director of the Office of Alien Property advised the appellant that "If additional cash should become available in debtor's account, supplementary payment on this allowed claim could then be made * * *." App. p. 16.

Following receipt of this determination and the accompanying notice, the appellant made diligent search for additional assets of United in this country and, more than four months later, discovered the two items of blocked property of United in the custody of J. P. Morgan & Co. and Guaranty Trust Co., namely Items (2) and (3), noted above.[9] The appellant was then advised that, contrary to the January 16, 1948, announcement of the Treasury Department, and contrary to the statement of the Acting Director of the Office of Alien Property made to the appellant when his claim was adjudicated under Section 34 of the Act, no license would be issued to permit his claim against United to be paid out of the United blocked assets. To protect his claim, the appellant on January 9, 1951, instituted an action in the Supreme Court of the State of New York against United by means of attachment warrants levied on the United assets. On May 2, 1952, appellant obtained a judgment against United for $62,219.86, this sum being the allowable indebtedness of the appellant against United in the

[9] This case does *not* involve an insolvent enemy debtor account. The assets of United captured under the Act far exceed the claims of outstanding American creditors. The appellant would now contend that, in view of the existence of blocked United assets sufficient to more than pay the total creditor claims together with the costs of administration of the debtor's estate, the appellee's determination under Section 34 that "only $28,560.83 is presently available in the debtor's account for the payment of" appellant's claim was in error because that finding disregarded "blocked" assets known by the Custodian to belong to United.

sum of $56,620.50 determined by the Office of Alien Property, plus interest, and minus the payment made to appellant against this debt by the Office of Alien Property of $28,650.83. App. pp. 17-19.

Thereafter, the appellant filed, with the Office of Alien Property in the Department of Justice, an application for a license to authorize a transfer of blocked property of United sufficient to pay the appellant's judgment. This application was denied. The appellant requested reconsideration and was advised, by letter of April 30, 1952, that the application was again denied. The denials were made, as evidenced by the affidavits introduced by the appellee in this case, because certain officials in the executive departments of the Government are waiting to obtain a change in the Act which will empower them to seize and use this property without paying appellant's claim. App. pp. 23-29.

Following these denials, the appellant, on May 28, 1952, brought this suit to enjoin the appellee from continuing to block the payment of his claim. The relief sought is an order of the court (1) declaring that the use by the appellee of his "blocking procedure" to defy the plan of the Act is illegal, and (2) directing that the appellee, *at his election and in accordance with the Act,* either license a transfer of United property in an amount sufficient to satisfy the appellant's claim or vest the United property in whole or in part, or otherwise cease and desist from his unlawful blocking of the payment of appellant's claim.

STATUTES AND TREATIES INVOLVED

Pertinent provisions of the statutes involved and of the Treaty of Peace with Hungary are set forth in the Supplement to this brief (pp. 49-52).

STATEMENT OF POINTS

I. Appellee has no authority under Section 5(b) of the Act to block a payment of a debt claim out of Hungarian enemy assets contrary to an adjudication under Section 34.

II. The appellee is depriving appellant of his right to payment and is threatening to take appellant's property without due process of law and in violation of the Constitution.

III. The Court has jurisdiction to order the appellee to cease and desist from unlawfully "blocking" payment of appellant's claim.

SUMMARY OF ARGUMENT

Appellee's authority in Section 5(b) of the Act to block enemy assets does not extend to blocking a payment out of enemy assets to an American creditor of a bona fide prewar debt claim already found by the appellee to be protected by Section 34—that is where the appellee has already found that Section 34 of the Act requires that this claim shall be paid out of assets of the enemy debtor captured under the Act.

The Act embodies the plan of Congress for the disposition of all enemy assets caught in this country during War. One of the features of this plan is to use these enemy assets to pay bona fide prewar debt claims of American creditors.

Section 3(a) of the Act makes it unlawful for any person in the United States to trade in or transfer any enemy property *except with a license granted by the President.* The second paragraph of Section 7(b) directs that this prohibition against any transfer of enemy property shall *not* prevent payment of money belonging to an enemy to a person in the United States who is not an

enemy, if the payment arises out of transactions entered into before the beginning of war and not in contemplation thereof. Section 9(a) provides that an American creditor may bring a suit in a District Court to recover his bona fide prewar debt claim out of the assets of an enemy debtor seized under the Act.

These sections embody permanent provisions of the Act applicable to all enemy property. They have been judicially construed to afford the bona fide prewar American creditor protection in his claims against enemy assets. In the case of blocked enemy assets, this protection is available by means of an attachment enforceable against the enemy debtor's assets subject only to the paramount licensing control of the federal government in carrying out the purposes and plan of the Act. *Koscinski* v. *White*, 286 F. 211, 215-216 (D.Ct., E.D., Mich., S.D., 1923); Two *Zittman* cases (Nos. 298 and 314), 341 U.S. 446, (Nos. 299 and 315), 341 U.S. 471 (1951). In the case of vested enemy assets, this protection is available by a Section 9(a) action against the Custodian in the District Court. *White* v. *Mechanics Securities Corporation*, 269 U.S. 283 (1925); *Markham* v. *Cabell*, 326 U. S. 404 (1945).

Section 34 was added to the Act in 1946 and is applicable, in particular, to World War II enemy assets. The enactment of Section 34 was urged upon the Congress by the Alien Property Custodian as embodying an improved plan for insuring payment to American creditors. It replaced the World War I "first come, first served" procedure with an equitable distribution among creditors. It established a precise procedure for determining for World War II enemy assets what creditor claims shall be paid and again, like Section 9(a), gave a right of appeal to the District Court.

In the case at bar, the Office of Alien Property has adjudicated the appellant's claim under Section 34. That office has found that appellant's claim is required by that

Section to be paid out of assets of United seized under the Act. The appellant contends that this determination is conclusive upon the appellee that (1) the Act is intended to provide for the payment of appellant's claim out of United assets captured by the Act, and (2) appellee has no countervailing authority in the Act to block payment of appellant's claim.

This construction of the Act for which the appellant is contending is supported by its legislative history, by the statements of the administrators of the Act before Congress and the Courts, by the principles heretofore followed in its administration, and by each Court decision that has touched upon this matter of the protection afforded to American creditors by the Act. The most recent pronouncement of the Supreme Court is summarized by Mr. Justice Jackson in these words:

> "[The Act] is not a confiscation measure, *but a liquidation measure for the protection of American creditors.*" (Italics added). *Zittman* v. *McGrath,* 341 U.S. 471, 474 (1951).

Both the Constitution and the Act reserve in Congress the authority to direct what disposition is to be made of enemy assets captured in this country during a time of War. Constitution, Article 1, Sec. 8, Cl. 11; U.S.C.A., Title 50, App. § 12. The Congress in the Treaty of Peace with Hungary has directed that Hungarian assets caught under the Act before the coming into force of the Treaty shall be seized and disposed of in accordance with the Act. Congress has further directed that the assets of United to which appellant lays claim shall be used to pay appellant's claim. This is the plain meaning of the adjudication of appellant's claim under Section 34. It is also the plain meaning of Sections 7(b) and 9(a) of the Act. Appellee, however, contrary to the Treaty of Peace, contrary to these provisions of the Act, contrary to prior administrative practice, and contrary to judicial prece-

dents, has embarked upon a new policy of frustrating American creditors. He contends that he has a countervailing authority in Section 5(b) of the Act which empowers him to block the payment of appellant's claim.

Section 5(b) was broadened by an amendment hastily enacted after Pearl Harbor. This Pearl Harbor amendment was enacted to empower the appellee to control and seize assets of any *foreign* national in order to catch enemy assets cloaked under neutral or friendly *foreign* ownership. *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480 (1947). This amendment was never intended to block any payments *out of enemy assets to non-enemy* American creditors. The occasion for this Pearl Harbor broadening of Section 5(b) affords no basis for reading into that section any authority to block the appellant's claim.

The amended Section 5(b) has been judicially construed not to contain authority in conflict with the existing plan of the Act. The Supreme Court has consistently held that this amended Section 5(b) became an integrated part of the whole existing Act and that its terms must be given a meaning consistent with other provisions of the Act. The authority in Section 5(b) to block assets, therefore, must be limited by the protections afforded to American creditors in Sections 7(b), 9(a) and 34 of the Act. In the *Uebersee* case, the Supreme Court confined the new authority in Section 5(b) to seize *foreign* assets within the scope of the previous plan of the Act for seizing *enemy* assets. In this case, the appellant is asking that the Court confine any authority in Section 5(b) to block *enemy* assets within the scope of the previous plan of the Act for blocking enemy assets. If the freezing power in Section 5(b) puts assets of any enemy debtor beyond the reach of bona fide prewar American creditors, "The logical end of that course would be a complete frustration" of the plan of the Act. *Zittman* v. *McGrath, supra,* at p. 457.

Hitherto, when dealing with enemy assets, the courts have viewed the blocking authority in Section 5(b) as an instrument of preliminary control to facilitate and prevent any interference with the program for vesting enemy assets. *Zittman* v. *McGrath,* two cases, *supra; Lyon* v. *Singer,* 339 U.S. 841 (1950); *Propper* v. *Clark,* 337 U.S. 472 (1949). Each of these leading decisions upheld the blocking authority in order to enable the appellee to vest and administer enemy assets in accordance with the plan of the Act. If the appellee may use the blocking authority in Section 5(b) to avoid Section 34 of the Act, by the same reasoning he may use that authority to avoid Sections 7(b), 9(a), 12, 32, and 39 of the Act. To argue that Congress afforded appellee authority in Section 5(b) to hold enemy assets blocked so as to avoid the plan of the Act is to argue that Congress legislated a "self generating stalemate". *Zittman* v. *McGrath, supra,* at p. 457.

Appellee has admitted that he is holding the Hungarian assets to which appellant lays claim blocked because he wants, and is planning, to seize and use these assets without paying appellant's claim. Appellee admits that, to do this, he is waiting for a change in the law. He suggests that if he gets the change he wants, he will use *Hungarian* enemy assets to pay war damage and postwar nationalization claims in lieu of the claims of the appellant and of other American creditors. No clearer case of a suspension of the application of the provisions of the Act could be had than the present case wherein the appellee has made all the findings that justify appellant's claim under Section 34 and has stated that he is nevertheless stopping payment because he proposes to avoid the consequences of Section 34 in the case of Hungarian enemy assets.

The Act, however, grants no scintilla of authority to the appellee to suspend its provisions for any enemy nation. Section 5(a) of the Act deals expressly with this matter of suspending the provisions of the Act. It dele-

gates to the President authority to suspend provisions of the Act *only* "as applied to an ally of enemy". Section 5(b), upon which appellee is relying for his authority, is not remotely concerned with suspending any of the provisions of the Act.

The appellee, moreover, is contending for an authority to suspend the plan of the Act in its application *only* to *blocked* Hungarian enemy assets. Appellee has paid appellant's claim to the full measure of the vested assets. Presumably, appellee concedes that he has no authority to suspend or change the plan of the Act for *vested* Hungarian assets.

The entire Act becomes meaningless if its provisions for the use and disposition of *vested* enemy assets do not also guide the control and disposition of *blocked* enemy assets. The portion of enemy assets, Hungarian and other, that has been vested and the portion that has remained blocked has been decided in the process of cutting up the bureaucratic jurisdictional pie. Neither portion bears any relation whatsoever to the use that should be made of any particular *enemy* assets, or of any group of vested or blocked, *enemy* assets. The Act never contemplated that there should be two separate plans for the use of enemy assets—one subject to Congressional direction but applicable only to *vested* enemy assets; the other subject to Executive direction and applicable to *blocked* enemy assets. Yet this is precisely the result which the appellee is seeking to achieve by applying the plan of Section 34 only to *vested* Hungarian assets and not to blocked Hungarian assets.

Section 34, like Sections 32, 12, 39 and other sections containing the plan of the Act, is applicable by its terms only to vested assets. But each of these sections is meaningful only if its plan is applied to all the assets captured under the Act belonging to an *enemy* owner, whether vested or blocked. The plan of Section 34 for an equit-

able payment of American creditors is made arbitrary and inequitable if it is applied only to that portion of an enemy debtor's assets which happen to have been vested. Likewise, the plan which the appellee proposes, which would use Hungarian assets for postwar nationalization claims without payment of American creditors, will be arbitrary and inequitable if it is applied only to Hungarian *blocked* assets.

The appellee is contending for authority to mutilate and distort Section 34 even though he concedes he has no authority himself to effectuate a different plan or to stop the operation of the plan in Section 34 for vested assets. The appellee is contending for authority to nullify Sections 7(b) and 9(a) of the Act even though the Supreme Court has consistently ruled that these Sections are basic to the full meaning of the Act. If the appellee should prevail, the appellee will have won for himself a far greater authority under Section 5(b) than he sought and was denied in the *Uebersee* and *Cabell* cases, *supra*. In short, appellee is contending for a blocking control under Section 5(b) which will empower him to stop the Congressional disposition of any enemy asset. In this case he is exercising this power by keeping Hungarian enemy assets in a blocked status until he can persuade Congress to legislate a *new and different disposition for those assets agreeable to the appellee.*

Moreover, *Zittman* v. *McGrath,* two cases, *supra,* are authority for holding that the appellant's New York State Court judgment and attachment created in the appellant as against United a valid lien interest in United's property, subject only to the exercise of paramount power under the Act. This paramount power does not include any authority to take the lien interest of the appellant and dispose of it to different citizens of the United States, holding no claim against the property or the enemy owner of the property. *United States* v. *Pink,* 315 U. S. 203

(1942). Also prior to the issuance of this attachment and judgment, the findings necessary under the Act to release the appellant's claim from any paramount powers under the Act had been made and published. Accordingly, when this attachment and judgment issued, the appellee had no authority to nullify or void the creation of this attachment lien. This attachment lien having been lawfully established under existing state and federal laws, and having been found not to adversely affect the national defense or security, as provided in the Act, and to be consistent with the purpose and policies of the Act, may not now be defeated or taken away from the appellant by the appellee without due process of law.

If the Court agrees that the appellee is not authorized to use his blocking authority under Section 5(b) of the Act in order to defeat the appellant's right to payment under Section 34 of the Act or in order to wipe out appellant's valid lien, then the Court has jurisdiction to enter an appropriate order compelling the cessation of the appellee's unlawful conduct. *The Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); *Waite* v. *Macy,* 246 U.S. 606 (1918); *Philadelphia Co.* v. *Stimson,* 223 U.S. 605 (1912).

ARGUMENT

I.

Appellee Has no Authority Under Section 5(b) of the Act to Block a Payment of a Debt Claim Out of Hungarian Enemy Assets Contrary to an Adjudication Under Section 34.

a. The permanent sections of the Act provide for the payment out of enemy assets of bona fide prewar claims of an American creditor.

The Trading with the Enemy Act, as amended, contains provisions of law of a permanent nature which automatically come into effect with a declaration of war and apply automatically to all enemy assets. See *Markham* v. *Cabell*, 326 U.S. 404, 413-415 (1945). The permanent provisions relevant here are found in Sections 3(a), 7(b) and 9(a) of the Act. These provisions are not "limited by references made to specific nations" or by "references to specific dates". They are permanent legislation applicable to the case at hand.

Section 3(a) makes it unlawful for any person in the United States to trade in or transfer any enemy asset without a license. This section is a statement of earlier common law adopted by the Congress to be the public policy and law of the United States. *Mayer* v. *Garvan*, 278 F. 27, 33 (C.C.A. 1st, 1922). See also *Schrijver* v. *Sutherland*, 57 App. D.C. 214, 19 F. 2d 688 (1927) cert. den., 275 U.S. 546 (1927); *Stoehr* v. *Wallace*, 269 F. 827 (D.Ct., S.D. N.Y., 1920), aff'd 255 U.S. 239 (1921).

Section 7(b) of the Act provides that the prohibition in Section 3(a) against any transfer of an enemy asset shall *not* prevent payment of money belonging to an enemy to a person in the United States who is not an enemy if the transactions underlying the payment were

entered into before the beginning of the war and not in contemplation of the war. This section also is an adoption by the Congress of earlier common law. *Watts, Watts & Co.* v. *Unione Austriaca Di Navigazione, etc.*, 248 U.S. 9 (1918).

Section 9(a) of the Act affords to a bona fide American creditor a right to payment out of vested assets of his enemy debtor, which right is enforceable in the Courts. *Markham* v. *Cabell, supra; White* v. *Mechanics Securities Corporation,* 269 U. S. 283 (1925).

Section 7(b) authorized the bona fide American creditor to attach enemy assets before seizure and to obtain a judgment "enforceable out of, and to the extent of, the proceeds of" the enemy assets, while Section 9(a), in case a creditor did not obtain satisfaction of his claim from the blocked assets of the enemy debtor, authorized the bona fide American creditor, after seizure of the assets, to institute an action in the District Court against and obtain payment from the Alien Property Custodian without making the enemy debtor a party to the suit. *Koscinski* v. *White,* 286 F. 211, 215 (D.Ct. E.D. Mich. S.D. 1923).

The common law and the permanent provisions of the Act provide for the payment of bona fide prewar American creditors out of enemy assets. Enemy assets are "frozen", but Section 7(b) provides that this freeze shall not prevent the payment of prewar, non enemy claims. When enemy assets are seized, Section 9(a) gives to the American creditor an enforceable right to collection before the assets are put to any other use. The plan of the permanent "main structural provisions" of the Act is to pay bona fide prewar claims of an American creditor out of any enemy assets of the enemy debtor caught in this country by war.

b. Section 34 of the Act establishes a parallel and particular plan for payment of American creditor claims out of World War II enemy assets.

During the first World War, creditor claims were paid on a "first come, first served" basis. *United States* v. *Securities Corporation General*, 55 App. D.C. 256, 4 F 2d, 619, 622 (1925), aff'd *sub. nom.*, *White* v. *Mechanics Securities Corporation, supra;* See also *Markham* v. *Cabell, supra,* at p. 410. Section 34 was enacted in 1946 to avoid this "first come first served" basis and to establish instead for World War II enemy assets a plan to distribute an enemy debtor's assets equitably among all bona fide prewar American creditors.

This plan for World War II enemy assets was requested by the Alien Property Custodian in a letter which fully recognized the permanent plan of the Act to pay American creditors out of enemy assets.[10] Testifying before the Congress, the Alien Property Custodian stated:

> "I want to make it clear to the committee that I am anxious to satisfy these creditors' claims, that I believe there is a strong moral obligation to satisfy them and that I favor judicial review of my determinations on these claims." (Hearings on H.R. 5089 before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 79th Cong., 2d

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[10] In his letter to the Chairman of the Committee on the Judiciary, House of Representatives, James E. Markham, then Alien Property Custodian, wrote: "At the same time in the absence of legislation clarifying my authority to set up a system of equitable distribution * * * *I may be compelled* * * * *to undertake the payment of debt claims on a 'first come first served' basis.* This will mean a scramble for position by creditors and many accounts may be exhausted to the total exclusion of late comers who may nevertheless have meritorious claims. I submit that the debt claim provisions of the pending bill are needed to prevent a condition of anarchy in this field." (Italics added.) Hearings on H.R. 5089, before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 79th Cong., 2nd Sess., (1946), p. 12.

Sess., (1946), p. 7—Statement of James E. Markham, Alien Property Custodian.)

Section 34 of the Act, enacted on August 8, 1946, confirmed for all World War II enemy assets the Congressional plan that American creditors are to be paid their bona fide prewar claims against enemy assets. It established a precise procedure for the filing of creditor claims, the adjudication of all claims against each enemy debtor "estate" in one proceeding, and the resultant distribution of the enemy assets in accordance with a specified order of preference of claims.

c. *The legislative history of the Act, administrative construction of the Act, and judicial precedents call for payment of appellant's claim out of United assets captured under the Act.*

The conclusion that the Act entitles appellant to payment of his claim is supported by the legislative history of the Act, by the statements of its administrators before Congress and the Courts, by the principles heretofore followed in the administration of the Act, and by each Court decision that has touched upon the matter of the protection afforded to American creditors by the Act.

Under Sections 3(a), 7(b) and 9(a), the right of bona fide prewar American creditors to payments out of World War I enemy assets was at all times recognized by the Executive and Judicial branches of our Government. A review of the administration of World War I enemy assets under these permanent provisions of the Act has uncovered no single instance wherein either the "freeze" of enemy assets or the "seizure" of enemy assets was made to defeat a payment of a bona fide prewar claim of an American creditor.

These permanent provisions of the Act provided a "first come first served" plan for the payment of prewar American creditor claims. *Markham* v. *Cabell, supra;*

White v. *Mechanics Securities Corporation, supra.* Section 34 of the Act provides a more explicit and more equitable plan applicable to World War II enemy assets. This World War II plan in Section 34 was intended to be surer and more equitable than the plan in the permanent provisions of the Act.

Before Section 34 was added to the Act, representatives of American creditor groups appeared before Congress and complained that enemy assets were being held blocked against their rights to recover their claims out of these properties. The representatives of the Government denied any intention to block enemy assets against American creditors. Ansel F. Luxford, Assistant General Counsel for the Treasury Department, told the Congress:

> "One of the most important considerations running through the policy of the Foreign Funds Control since its very inception in April 1940 has been that of protecting the rights of American creditors." (Hearings on H. R. 4840 before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 78th Cong. 2d Sess., (1944), p. 85. (Testimony of Ansel F. Luxford, Assistant General Counsel, Treasury Department.))

Mr. Isenburgh, for the Department of Justice, when Section 34 was under consideration, explained to the Congress the concern of his Department to pay American creditors as follows:

> "An American having advanced credit with the notion that he would be protected because there are assets here is being given nothing more than his normal expectation. We thought it fair to extend that kind of protection to residents of the United States who have our protection generally, but the same basic justification does not exist in the case of a foreigner who did not advance credit in the United States in reliance upon existence of assets here." (Hearings on H.R. 5089 before Subcommittee No. 1 of the Committee on the Judiciary, House of Repre-

sentatives, 79th Cong. 2d Sess., (1946), p. 143, Statement of Mr. Isenburgh, Special Assistant to the Attorney General.)

Shortly before Section 34 was added to the Act, Section 32 was enacted to enable the administrative return of certain vested assets to certain victims of Nazi persecution and certain owners who were not enemies. In this provision for the administrative return of property, the Congress also took care that American creditors be given an opportunity to reach these assets before the returns should be made.[11] These provisions in Section 32(f) for safeguarding American creditor claims illustrate further the constant intent of Congress to pay American creditor claims.

This plan and purpose is also expressed in the Annual Report of the Office of Alien Property Custodian for the fiscal year ending June 30, 1946. The report sets forth the policy which had been adopted for the administration of Sections 34 and 32 of the Act. It states:

> "The Office of Alien Property Custodian has consistently held the view that American creditors of an enemy whose property has been vested have a moral right to payment out of the proceeds of that property. *If the Custodian had not vested the American assets of the debtor, the creditor could have collected by attaching the assets.*" Annual Report, at page 8. (Italics added.)

This statement in the 1946 Annual Report accurately reflects the policy that has guided Administrators of the Act until the recent change of policy reflected in the appellee's refusal to permit payment of appellant's claim. The right under the Act of American creditors to be paid out of enemy assets captured by the Act has been a right heretofore uniformly protected by the administrators of

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[11] Congress had taken care that American creditors be given an opportunity to reach World War I enemy assets before returns should be made U.S.C.A., Title 50, App. §30.

the Act. This right has applied to all vested enemy assets by application of the mandatory requirements of Sections 9(a) and 34 of the Act. It has applied to other enemy assets captured by the Act—that is, to blocked enemy assets—by means of safeguards taken by the Administrators for the benefit of creditors prior to the release of blocked assets.

In 1947, when the Treasury Department announced its procedure for protecting the claims of American creditors against Italian enemy assets *blocked* under the Act, its announcement stated:

> "The Treasury Department announced today that it is prepared, in appropriate cases, to grant licenses for payments to creditors of business organizations and individuals in Italy from blocked accounts in this country in which the debtors have an interest.
>
> "In announcing this step, Treasury Department officials pointed out that this announcement is a *necessary preliminary* to the establishment of any procedure for the release of Italian blocked assets in the United States. * * *" (Italics added) *Treasury Department, Press Service, No. S*-337, May 20, 1947. (Supplement, p. 52)

In 1948, the Treasury Department announced a similar safeguard for the rights of American creditors to payments out of the very same Hungarian enemy assets which the appellee is now blocking against the payment of appellant's claim. *Treasury Department, Press Service No. S-599,* dated January 16, 1948. (Supplement, p. 53)

There has been no public announcement of any departure from this administrative policy to safeguard American creditors in accordance with the plan of the Act.

The appellant's claim is plainly an "appropriate case" under that policy. The appellant holds an adjudication in his favor under Section 34 of the Act and a judgment and attachment of a New York court. Nevertheless, a license

to permit payment of his claim is being withheld by the appellee and, in addition, the appellee has represented in this proceeding that he is withholding this license because he proposes to use these Hungarian assets to pay other war damage and post war nationalization claims in lieu of the appellant's claim. This is a novel departure from the earlier administrative policy, and a novel departure from the plan of the Act. This new policy has been adopted in secrecy to defeat the claim of this appellant and of other American creditors whose claims are "appropriate cases" for payment out of Hungarian enemy assets.

This new policy is not only contrary to the earlier administration of the Act, it is also contrary to certain basic principles that have uniformly guided courts in their construction of the Act. Courts have uniformly found that the Act was intended to and did hold and take control of *all enemy* property. *Deutsche Bank Und Disconto—Gesellschaft* v. *Cummings,* 65 App. D.C. 297, 83 F. 2d 554, 556 (1936) rev'd on other grounds *sub nom Cummings* v. *Deutsche Bank,* 300 U.S. 115 (1937); *United States* v. *Securities Corporation General, supra; Koscinski* v. *White, supra.* Courts have uniformly found that Section 12 of the Act requires that all enemy property, captured under the Act, shall be disposed of as Congress shall direct. *Guessefeldt* v. *McGrath,* 342 U.S. 308 (1952); *Woodson* v. *Deutsche Gold,* 292 U.S. 449 (1934); *White* v. *Mechanics Securities Corporation, supra.* Courts have uniformly found that Congress has directed in the Act that bona fide prewar claims of American creditors are protected by the Act. *Zittman* v. *McGrath, supra; Markham* v. *Cabell, supra; White* v. *Mechanics Securities Corporation, supra; Koscinski* v. *White, supra.* Mr. Justice Jackson, writing for the Court in the *Zittman* case stated (341 US at 474):

> "[The Act] is not a confiscation measure, but a liquidation measure for the protection of American creditors."

Appellant submits that the clear plan and pattern of the Act, supported by its history, its administration, and its judicial construction, call for the payment of appellant's claim out of United assets captured under the Act.

d. Congress has directed that appellant's claim is to be paid out of the "United" assets.

The power to seize and dispose of enemy property is derived from Art. 1, §8, cl. 11 of the Constitution which confers upon *Congress* the power to "make Rules concerning Captures on Land and Water". *Silesian American Corporation* v. *Clark,* 332 U. S. 469 (1947); *Brown* v. *United States,* 8 Cranch (U.S.) 110 (1814). It is settled that the Executive Branch cannot, in the absence of a legislative grant of power, seize and dispose of enemy property found within this country. *Brown* v. *United States, supra.* The power of the appellee to seize and dispose of enemy property rests entirely upon the provisions of the Act.

Section 12 of the Act has been consistently construed by the Courts and the Administrators of the Act to reserve in Congress all authority to dispose of all enemy assets as it may deem expedient and shall direct. *Guessefeldt* v. *McGrath, supra; Woodson* v. *Deutsche Gold, supra; White* v. *Mechanics Securities Corporation, supra.*

Because the Hungarian blocked assets of United to which appellant lays claim are *enemy* assets captured under the Act, this reservation by Congress of the authority to direct the disposition is fully applicable to them. The plan of the Act, from its inception, has provided that all enemy assets shall be controlled and disposed of in accordance with the mandate of Congress. This plan has been scrupulously followed in the control of enemy assets even in cases where the public policy of our Government has turned against the seizure and retention of the particular enemy assets. Where our im-

proved relations with Italy made advisable the return of Italian property to Italian owners, the full plan of the Act was nevertheless applied to *all* Italian enemy assets, blocked and vested, captured under the Act. No returns were made of any Italian enemy assets until after Congress amended Section 32 of the Act to provide for such returns. Even then American bona fide prewar creditors were given an opportunity to recover their claims against any Italian vested enemy assets before returns to the owners were made. Section 32 of the Act, as amended on August 15, 1947, 61 Stat. 784, U.S.C.A., Title 50, App. §32. Before blocked Italian assets were released pursuant to General License No. 95, as amended August 29, 1947, licenses were issued allowing payment to creditors who would be eligible for payment under Section 34. Press Service No. S-337, dated May 20, 1947. (Supplement, p. 52)

Article 29 of the Treaty of Peace with Hungary contains a direction from Congress that Hungarian World War II enemy assets are to be seized and disposed of under the Act. (Supplement, p. 51) There is no cause for imputing to Congress, to the public interest, or to the benefit of the United States, any different plan at this time. The affidavits offered by the appellee in this case state additional present grounds for seizure of these assets. The appellee has offered no suggestion that these assets should not be seized. To the contrary, appellee's own defense in this case evidences the present necessity for the seizure of all Hungarian enemy assets.

No extended argument is needed to show that Congress has directed and required that appellant's claim shall be paid out of United assets *seized* under the plan of the Act. Section 34 has been found to direct and require that the assets of United to which appellant lays claim, when seized, shall be used *first* for paying appellant's claim. This is the plain meaning of appellee's adjudica-

tion under Section 34 of the Act. Pursuant to Section 34, appellant's claim has been paid already in part, and with respect to the unpaid balance the appellee has stated, "if additional cash should become available in the debtor's account, supplementary payment on the allowed claim could then be made." App. p. 16.

The appellee is presently faced with two clear and unequivocal directives from Congress. He has been told to seize and liquidate all World War II Hungarian enemy assets. This directive was issued more than five years ago. He has been told to pay the appellant's claim out of any assets of United that he seizes. This directive became final in June 1950 when he determined appellant's right under Section 34 of the Act.

The appellee has been fully empowered to carry out these directives at all times. It is futile to argue that Congress might grant to the appellee any powers to seize these World War II Hungarian enemy assets not already contained in the Act. Congress has already granted to him in the Act every authority that Congress is able to grant him under the Constitution. *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480 (1947). Congress has granted the authority and has directed how that authority is to be used. Under these circumstances, the appellee has no discretion or authority to use any powers that may have been granted to him in the Act for the purpose of accomplishing any different plan in conflict with these Congressional directives.

e. *Section 5(b) of the Act does not authorize the appellee to block a payment out of enemy assets to an American creditor in contravention of Sections 7(b), 9(a), 34, and 12 of the Act.*

The powers conferred by the Act upon the Executive were no doubt considerably broadened by the amendment to Section 5(b) enacted on December 18, 1941. Section

301 of the First War Powers Act, 55 Stat. 839, U.S.C.A., Title 50, App. §5(b). This amendment was first presented to the Congress after Pearl Harbor. It was enacted in haste with no attention given to defining its precise effect upon already existing authority. It is necessary, therefore, that this amended Section 5(b) be read in the light of the conditions that called forth its enactment and that it be given a construction in context with other provisions of the Act.

This Pearl Harbor amendment was enacted, not to confer upon the appellee greater powers over *enemy* property which he could already control and seize under the Act as it then stood, but to enable him to control and reach *enemy tainted foreign* property, a type of property which he was not able to control and reach under the Act as it then stood. *Clark* v. *Uebersee Finanz-Korp., supra.* This is made fully clear in the opinion of Justice Douglas in the *Uebersee* case, *supra,* (332 U.S. at pp. 484, 485).

This purpose did not necessitate any change in the provisions of the Act governing the control and use of enemy assets previously within the reach of the Act. In particular, this purpose bears no relation at all to the payment of the claims of American creditors out of enemy assets. Accordingly, if the appellee has in Section 5(b) the authority to stop the plan of the Act for payments to American creditors, this authority must be found to have been included in the broadened Section 5(b) entirely aside from the particular purpose of and occasion for the amendment.

The Supreme Court has already determined that Section 5(b) contains no authority to seize and retain any asset in contravention of Section 9(a) of the Act. *Clark* v. *Uebersee Finanz-Korp., supra; Markham* v. *Cabell, supra.* The same considerations that guided the Court to its decisions in those cases lead also to the conclusion that Sec-

tion 5(b) contains no authority to block any asset in contravention of Sections 7(b) and 34 of the Act.

Over the years since its enactment in 1917, the Act has become a patchwork of amendments. Many of these amendments like the amendment of Section 5(b) have been hastily enacted. None has served to recodify or revise the full text of the Act. Accordingly, it has become necessary to construe each separate provision in the light of the full plan of the Act, and this necessity has been recognized by the Courts time and again when the Administrator of the Act has attempted to derive authority from an isolated reading of any one provision of the Act which reading, if accepted, would do violence to the full plan of the Act. In *Guessefeldt* v. *McGrath, supra,* the Supreme Court, despite the literal sense of Section 39 of the Act, permitted a German national to recover his property under Section 9(a) of the Act, and thereby preserved "the consistency of the pattern of enactment".[12] Mr. Justice Douglas wrote in the *Uebersee* case (332 US at 488):

> "We are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole. Our task is to give all of it—1917 to 1941—the most harmonious, comprehensive meaning possible".

In the *Uebersee* case, this Court held that the amendment of Section 5(b) in 1941 did not render inoperative the provisions of Section 9(a) for the return of vested assets to a non-enemy owner. *Uebersee Finanz-Korporation* v. *Markham,* 81 App. D.C. 284, 158 F. 2d 313, 315

[12] Section 39 of the Act reads in pertinent part: "No property or interest therein of Germany, Japan, or any national of either such country vested * * * at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein."

(1946). In the *Cabell* case, Judge Learned Hand for the Court of Appeals for the Second Circuit placed the right of the American creditor to payment of his claim under Section 9(a) on an equal footing with the right of the non enemy owner to a return under Section 9(a). In that case, as in this, the appellee contended that Section 5(b) had changed the plan of the Act and granted to the appellee a new authority to disregard the claims of a creditor.

> "This language [debt claim provisions of Section 9(a)] is mingled with that giving a remedy for property mistakenly seized and it is unnecessary to labor the point that it was intended to put creditors upon an equal footing with owners. Indeed, although we assume it to be true that for constitutional purposes it was not necessary to allow the alien's creditors any recourse to the seized property, since the alien himself remains liable; for practical purposes there is little difference between debts and claims to property." *Cabell* v. *Markham,* 148 F. 2d 737, 739 (C.C.A. 2d, 1945).

In the *Zittman* case the Supreme Court has explicitly recognized the right of the American creditor to protection under the broadened powers of Section 5(b) of the Act. The Court in that case reasons that the authority to block assets under Section 5(b) serves to permit the appellee to screen transactions underlying the claims of American creditors for any enemy taint. The Court apparently assumed that, upon a finding that no enemy taint existed, a payment to an American creditor would be licensed to carry out the plan of the Act. Mr. Justice Douglas, in a concurring opinion, stated (341 U.S. at 465):

> "Payment of claims requires a license. A license, of course, may be refused when payment would accrue directly or indirectly to the benefit of the enemy."

See also *Lyon* v. *Singer,* 339 U.S. 841 (1950).

In the *Zittman* case, the appellee sought a declaration that an unlicensed attachment against an enemy debtor's assets was null and void and created no rights against the enemy debtor. The Supreme Court found that such a declaration would frustrate the policy of Section 5(b), which was construed only to give such authority to block assets as would be necessary to, and consistent with, the plan of the Act. Justice Jackson, speaking for the Court in the *Zittman* case, stated (341 U.S. at 457):

> "If, as the Custodian now contends, the freezing program puts all assets of an alien debtor beyond the reach of an attachment, it is not difficult to see that there can be no adjudications of the validity of American claims and consequently the claims, not being settled, would not be satisfied by the Treasury. *The logical end of that course would be complete frustration of a large part of the freezing program. We cannot believe that the President intended the program to reach such a self-generated stalemate.*" (Italics added.)

It is submitted that the policy of protecting American creditors would be likewise stalemated if the appellee is empowered by Section 5(b) to block a payment to an American creditor after a determination has been made that the American creditor has a right to payment under Section 34.

f. By reason of the Treaty of Peace with Hungary, the assets of "United" out of which appellant seeks payment of his claim are subject to the plan of the Act for payment of American creditors.

After World War I was officially ended by the Treaty of Peace, it was held that enemy property caught in this country during that war but not seized could no longer be controlled and disposed of under the Act. *Sutherland* v. *Guaranty Trust Co.*, 11 F 2d 696 (C.C.A. 2d, 1926). One of the purposes of the Treaty of Peace with Hungary was to preserve the right to control and

dispose of Hungarian enemy assets captured in this country during World War II but not theretofore seized. Article 29 of the Treaty is expressly designed to accomplish this purpose. Article 29 provides:

> "1. Each of the Allied and Associated Powers shall have the right to seize, * * * or take any other action with respect to all property, * * * which at the coming into force of the present Treaty are within its territory and belong to Hungary or to Hungarian nationals, * * *.
> 2. The liquidation and disposition of Hungarian property shall be carried out in accordance *with the law of the Allied or Associated Power concerned.* The Hungarian owner shall have no rights with respect to such property except those which may be given him *by that law.*" (Italics added.)

The Office of Alien Property has expressly recognized that this Treaty provision continued in effect its power to vest Hungarian assets blocked under the Act during the War. However, solely for reasons of policy, the exercise of the vesting power was suspended after the Treaty was ratified. For four consecutive years thereafter, the Office of Alien Property explained this matter in its annual report in this manner:

> "The Treaties of Peace with Bulgaria, Hungary, Italy, and Roumania came into force on September 15, 1947. Although provision is made in each of these treaties for continuance of vesting by the United States, this Office, in consultation with the Department of State, has suspended vesting of the property of nationals of these countries as a matter of policy." Annual Report, 1947, p. 2, ftn. 6; 1948, p. 2; 1949, p. 2; 1950, p. 2.

The Treaty of Peace with Hungary was executed by Hungary on the one hand and by the many allied and associated powers on the other hand, of which the United States was one. Article 29 stated that the liquidation and disposition of Hungarian property "shall be carried out

in accordance with the law of the Allied or Associated Power concerned". In the case of the United States, the law concerned was and still is fully contained in the Act. Ever since the Act was enacted during the First World War, the Act has been the sole grant of authority from the Congress to the President to block and vest, to liquidate and dispose of, enemy assets. *The Control of Foreign Funds by the United States Treasury*—William Harvey Reeves, published in Law and Contemporary Problems, Vol. XI, p. 17, 36, (1945). See also *Guessefeldt* v. *McGrath, supra; Zittman* v. *McGrath, supra; Silesian American Corp.* v. *Clark, supra; Stoehr* v. *Wallace, supra.*

The appellee must concede that it is the Act which is presently governing the disposition and liquidation of all World War II Hungarian assets blocked or seized before the coming into force of the Treaty of Peace with Hungary.

In the case of Germany, Japan, and Italy, our Government also held substantial portions of enemy assets blocked but not vested when the War was terminated. In each case, a safeguard comparable to Article 29 was adopted by the Congress.[13] In the case of Germany, when the President, in the summer of 1951, requested a Joint Resolution of the Congress to terminate the war, he cited that "our peace treaties with Bulgaria, Hungary, Rumania, and Italy all authorize the continued vesting and retention of" the enemy assets blocked but not vested at the time of the Peace. The President stated the program of his office as follows:

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[13] H.J.R. No. 289, entitled "Joint Resolution to terminate the state of war between the United States and the Government of Germany," U.S.C.A., Title 50, App. p. XX; Treaty of Peace with Japan, dated September 15, 1951, Article 14, U.S. Code Cong. Serv., p. 2730; Treaty of Peace with Italy, signed February 10, 1947, Article 79, 61 Stat. 1245 (1947).

> "Completion of the vesting of wartime enemy property even after the conclusion of peace, is commonly accepted practice in connection with the settlement of claims between the nations which were at war." (Sen. Rept. No. 892, to accompany H.J.Res. 289, U.S.C. Cong. Serv., 82nd Cong., 1st Sess. (1951), p. 2359.)

By reason of this common practice, and by reason of the Treaty of Peace with Hungary, blocked Hungarian assets have continued to this date subject to the controls and directives of the Act. Under the Act, the authority of the Administrator to choose between blocking and vesting is a power altogether different from the power to suspend the plan of the Act for payment of American creditors. It is this latter power that the appellee is unlawfully asserting in this case.

g. Appellee has no authority to suspend the plan of the Act for the payment of American creditors.

The blocked assets of United far exceed all creditor claims. Also, the appellant has fortified his particular claim with an attachment and a judgment. Nothing remains to be done by the appellee to effectuate the adjudication of appellant's claim under Section 34 other than a purely ministerial issuance of a license in accordance with determinations of fact and policy already made. No clearer case of a suspension of Section 34 could be had than the present refusal of the appellee to license payment of appellant's claim.

The appellee is blocking the payment of appellant's claim not for any reason peculiar to appellant or peculiar to this particular claim, but because United is a Hungarian national. The appellee admits that his ground for refusing to permit payment of appellant's claim is that the claim, if paid, would diminish the balance of *Hungarian* enemy assets left for compensation of war damage and post war nationalization claims against Hungary. In

effect, the appellee admits that he is suspending the payment of *all* American creditor claims out of *any Hungarian* blocked enemy assets, and that his action in not permitting the payment of appellant's claim is taken pursuant to this broader policy, and for no other reason.

It is a fundamental principle of our Constitution that the Executive Branch is prohibited from exercising the legislative power. *The Youngstown Sheet and Tube Co.* v. *Sawyer, supra*; *Opp. Cotton Mills, Inc.* v. *Administrator of the Wage & Hour Division of the Department of Labor,* 312 U.S. 126 (1941); *Field* v. *Clark,* 143 U.S. 649 (1892). It is settled that the exercise of the power to suspend legislation is an exercise of the legislative power. *Field* v. *Clark, supra.* The power of the Executive to suspend a law will be found only where there is an explicit direction from Congress and where the direction sets forth the conditions to be found by the Executive prior to any suspension of the law. *Hampton Jr. & Co.* v. *United States,* 276 U.S. 394 (1928). These conditions must be defined by Congress with sufficient clarity so that the suspension of the law, when exercised by the Executive, is done, as it were, under the direction of Congress.

The Act grants no scintilla of authority to suspend its provisions as applied to a particular enemy. To the contrary, the Act specifically deals with the suspending power and makes it clear that Congress intended that the *only* authority granted to the appellee to suspend the terms of the Act apply to an "ally of enemy".[14] Section 5(a) delegates to the President the authority to suspend the

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[14] Hungary was an enemy nation under the Act because it was a nation against which the United States declared war. U.S.C.A., Title 50, App. §2, Joint Res. of June 5, 1942, C. 324, 56 Stat. 307. See also Section 32 of the Act which expressly prohibits the return of vested Hungarian assets to the Hungarian enemy owner U.S.C.A., Title 50, App. §32.

provisions of the Act "as applied to an ally of enemy". The grant in Section 5(a) of this express authority to suspend the plan of the Act in the limited case of an "ally of enemy", forecloses the possibility of implying into Section 5(b) the much broader authority to suspend the Act for an enemy nation.[15] Section 5(b) deals with the *extension* of powers in the Act to *foreign* nations and is not remotely concerned with suspending the application of the Act to an *enemy*. Accordingly, it is abundantly clear that Congress never intended nor anticipated that, under the authority of Section 5(b), the appellee would suspend the application of any provisions of the Act to any enemy assets.

Nor do the appellee's reasons for suspending, render the suspension any more legal. The affidavits submitted by the appellee reveal the conditions on which the appellee has suspended the plan of the Act to pay American creditors. These conditions are (1) that Hungarian enemy assets will be substantially depleted by payment of the creditors' claims allowable under the Act, and (2) that Hungary may not fulfill all its Treaty obligations for payment of war damage claims, and (3) that Hungary may not agree to compensate United States holding companies for damages resulting since the War from the nationalization of their subsidiaries in Hungary. The Act contains no hint that any one or any combination of these conditions constitutes a ground for suspending[16]

[15] The discussions in Congress show that Congress was aware that it was withholding a delegation of the power to suspend the provisions of the Act as applicable to "enemy" nations. The purpose of the delegation to suspend for an "ally of enemy" was to give a power which might be useful to win the "ally of enemy" to our side. Cong. Rec., Vol. 55, Part 5, 65th Cong., 1st Sess., p. 4865.

[16] Appellee states that the change in law might be effectuated by Executive Order, App. p. 25, thus bypassing the Congress which has expressly provided that enemy assets shall be disposed of under its direction. U.S.C.A., Title 50, App. §12.

its plan for payment of American creditors. To the contrary, the plan of the Act contemplated in particular the situation where creditor's claims would exhaust enemy assets. Section 34 of the Act. Also when Congress revised its plan for payment of American creditors by enacting Section 34, the plan was endorsed by the Alien Property Custodian and the Attorney General, with the concurrence of the State Department, and all expressly recommended that "general reparations" should be subordinated to claims of American creditors.

> "Although it has been suggested that vested property should be devoted to general reparation of Americans whose property has been injured by enemy action, it would seem that the legitimate claims of creditors should first be satisfied." (Hearings on H.R. 4840 before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 78th Cong., 2d Sess., p. 12 (letter from the Attorney General and the Alien Property Custodian to the Speaker of the House of Representatives).)

The argument made by the appellee that he can suspend payment to American creditors because he "feels" that war damage and post war nationalization claimants should be compensated *first* from World War II Hungarian enemy assets is in essence similar to the refusal of his predecessor to pay creditors from World War I German enemy assets because that predecessor "felt" that the United States should be compensated *first* from such assets. This argument was rejected by the Supreme Court in *White* v. *Mechanics Securities Corporation, supra,* per Justice Holmes (269 US at 300-301).

h. Appellee is not authorized by Section 5(b) of the Act to exercise a control over blocked enemy assets that would mutilate or nullify Sections 7(b), 9(a) and 34 of the Act.

The appellee contends that, because the United assets to which appellant lays claim are blocked and not vested,

he is not compelled by any provision in the Act to exercise his control over these *blocked* assets in a manner to protect payment of appellant's claim. He argues that what the Act requires shall be done with respect to *vested* enemy assets is not required by the Act to be done with respect to *blocked* enemy assets. He carries this argument one step further and asserts in this case an authority to control *blocked* enemy assets in a manner designed for the express purpose of avoiding what is required to be done with respect to *vested* enemy assets.

That Congress did not intend any such result is well illustrated by the following interchange between Congressman Celler and Mr. Luxford, Assistant General Counsel of the Treasury Department, when the bill containing Section 34 of the Act was under consideration:

> Congressman Celler: "If property held by the Alien Property Custodian is not sufficient to pay debt claims against that property held by the Alien Property Custodian is there any reason why property controlled by the Treasury should not also be made available for the payment of those claims?"
> Mr. Luxford: "No, sir."
> Congressman Celler: "And you will make it available?"
> Mr. Luxford: "Yes, Sir * * *." (Hearings on H.R. 4840 before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 78th Cong., 2d Sess., (1944), p. 107.

Congressman Celler's question is precisely the question in issue here. However, the appellee has chosen to answer that question in the exact reverse of what was represented to the Congressman by Mr. Luxford.

Congressman Celler's question was, in fact, a question with a self evident answer. As we have seen, the entire plan of the Act rested upon the supposition that enemy assets were to be captured under the Act and thereafter disposed of as Congress should direct. To assume that

Congress intended that enemy assets were to be subject to two entirely separate and independent plans, one for *blocked* assets subject to Executive direction, and the other for *vested* assets subject to Congressional direction, is unthinkable and entirely without any vestige of support in the legislative history. Any such assumption makes not only Section 34 of the Act, but all the other Sections applicable to *vested* enemy property, futile and meaningless. Congressman Celler was putting into the record an obvious premise that underlay Sections 9(a), 12, 32, and 34, as well as other provisions in the Act applicable by their terms only to vested enemy assets.

So far as enemy assets were concerned, the *blocking* authority must be viewed as nothing more than an authority preliminary or ancillary to the vesting authority. Enemy assets, unlike foreign assets,[17] once "blocked" may not be returned by the Administrator to the enemy owner without direction from Congress. Accordingly, *"blocked"* enemy assets stand in exactly the same position so far as the Congressional mandate is concerned as *"vested"* enemy assets. Both are held under the Act awaiting direction from the Congress with respect to their disposition.

The authority in Section 5(b) to block enemy assets is nothing more than an instrument of preliminary control to facilitate and prevent any interference with a government vesting. *Zittman* v. *McGrath, supra.* The former Chief Counsel and Associate Chief Counsel of the Division of Foreign Funds Control have stated in a jointly written article that blocking enemy property "was an instrument of economic warfare and tantamount to complete immobilization as a preliminary step to formal vesting." Alk and Moskowitz, *Removal of United States Con-*

[17] General License No. 95 accomplishes the return of all non enemy tainted foreign assets.

trols over Foreign-Owned Property, Vol. X, Federal Bar Journal, October 1948, No. 1, p. 5.

To date, whenever the defendant has been called upon in the courts to sustain the use of its blocking authority over enemy assets, it has represented the blocking authority as a control "short" of vesting and necessary as a means to preserve the *status quo* for vesting. In the leading decisions in the Supreme Court, that Court has guarded against any restriction of the authority to block enemy assets that would result in restricting the *vesting* authority. *Zittman* v. *McGrath, supra; Lyon* v. *Singer, supra; Propper* v. *Clark,* 337 U.S. 472 (1949). In each of these leading decisions, the blocking authority was upheld in order to enable the appellee to administer enemy assets in accordance with the provisions of the Act governing the use and disposition of *vested* assets. In no case brought prior to this proceeding has the Government contended for a blocking authority over enemy assets which would nullify and mutilate the provisions governing the use and disposition of vested enemy assets.

Recently in opposition to a writ of certiorari to the United States Court of Appeals for the Second Circuit, the Attorney General argued that a claim of an attachment creditor against certain vested assets should be denied because granting the claim will interfere with the plan of the Act for an *equitable* payment to American creditors and "would defeat the purposes of the federal freezing and vesting programs." *Orvis* v. *James P. McGranery,* In the Supreme Court of the United States, October Term, 1952, No. 404, Brief for Respondent in Opposition, page 13, cert. granted, December 15, 1952, 21 U.S. Law Week 3170.

The division between enemy assets that have been blocked and those that have been vested is the result of a contest for bureaucratic control over enemy assets. The Treasury Department had control so long as enemy assets

remained blocked. It lost control to the Alien Property Custodian when enemy assets were vested. The Treasury Department adopted, therefore, a policy of holding enemy assets blocked. The Alien Property Custodian adopted the different policy of vesting any enemy assets that came under his dominion. The result is a completely arbitrary division of enemy assets into "blocked" assets and "vested" assets, neither group having any relation to the Congressional plan for the use and disposition of enemy assets and neither group being more suited to disposition under the Congressional plan than the other group.[18]

Presumably, the appellee will concede that Section 34 of the Act will not work an equitable distribution of enemy assets in payment of American creditors if Section 34 is to apply only to the portion of Hungarian assets that has been "vested". Nevertheless, appellee must concede that the Act compels him to administer Section 34 for these vested assets—as he has done in this case.[19] Presumably the appellee is contending that Section 5(b) has conferred on him an authority to mutilate the plan of Section 34, by causing it to apply to an arbitrarily selected fractional portion of World War II Hungarian enemy assets. He is asking for authority to destroy "the consistency of the pattern of enactment" of Section 34. *Guessefeldt* v. *McGrath, supra.*

Moreover, if he has authority to destroy in this manner the pattern of Section 34 of the Act, there is no restraint

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[18] The appellee, presumably, can advise the Court of the amounts of enemy assets, blocked and vested.

[19] In this case Section 34, if applied only to vested assets of United will distribute to another creditor and to the Government a substantial part of a sum which, before the war, was held in appellant's own company's account as a set off against the larger sum owed to appellant by United, See *McGrath* v. *Manufacturers Trust Company*, 338 U. S. 241 (1949).

in the Act to prevent his exercising this same blocking authority to destroy the pattern of Section 12, which directs that enemy assets may be used only as Congress may direct; Section 32, which directs the return of enemy assets to certain non enemy owners and persecutees; Section 39, which directs that enemy assets shall not be returned to German owners; Section 9(a), which directs that the interests of United States citizens in enemy assets shall be paid.

Each of these Sections, like Section 34, is by its terms applicable to *vested* assets only. Yet if these Sections are not intended also to guide the control and disposition of "blocked" assets, each may be made meaningless in exactly the same way that the appellee is now making Section 34 meaningless for Hungarian enemy assets.

These questions must be asked of the appellee: Does he have authority to refuse to license a transfer of a blocked asset to a non enemy owner to whom a return is directed under Section 9(a)? Does he have authority to refuse to license a transfer of a blocked asset to a victim of Nazi persecution to whom a return is directed under Section 32? Does he have authority to refuse to license a transfer of an asset to a prewar bona fide non enemy lienholder, for instance, the holder of a mortgage on an enemy asset to whom a return is directed under Section 9(a)? Does he have authority to lift his blocking controls over Hungarian enemy assets and thereby permit their return to the enemy owners to whom a return is prohibited by Section 32?

Appellee's argument that he is empowered to block payment of appellant's claim to prevent the application of Section 34 is no better than the argument that he may "block" the Queen Elizabeth simply for the purpose of escaping the necessity of releasing the Queen Elizabeth to her owners under Section 9(a).

The appellee, by his own admission, even if he has this power to block the effectuation of the Congressional plan of the Act, is still unable to effectuate the plan for the use of Hungarian enemy assets which he proposes. He is claiming authority to take one step to defeat the payment of American creditors when he has no authority to effectuate a changed plan and no authority to stop the existing plan in its application to *vested* assets. If there is merit at all to the appellee's proposed different plan for the use of Hungarian World War II assets, that merit is equally applicable to all such assets—not only to *blocked* Hungarian assets. Appellee is seeking in truth a change in the entire Congressional plan for the use of Hungarian enemy assets, blocked and vested alike. His proper forum is before Congress with a new bill, not before this Court under the present Act.

The Court, we believe, will not read into Section 5(b) an authority over *blocked* enemy assets which, if exercised, will destroy the existing pattern of Section 34 of the Act and will give force and effect to a principle of differentiation between blocked and vested assets which would make meaningless virtually every basic provision in the Act for the use of enemy assets.

CONCLUSION

Appellee has no authority under Section 5(b) of the Act to block a payment of a debt claim out of Hungarian enemy assets contrary to an adjudication under Section 34.

II.

The Appellee Is Depriving Appellant of His Right To Payment and Is Threatening To Take Appellant's Property Without Due Process of Law and In Violation of the Constitution.

a. The New York State Court judgment and attachment have created for the appellant a valid lien upon the property subject to the attachment.

The Supreme Court has held that a New York State Court attachment levied upon blocked property which does not "purport to control the Custodian in the exercise of the federal licensing power, or in the power to vest the *res* if he sees fit to do so for administration", is not inconsistent with the blocking program and is valid except "as against the Custodian, exercising the paramount power of the United States". *Zittman* v. *McGrath, supra* at 463-464.

Prior to issuance of the New York State Court attachment and judgment, the appellee had determined that the debt claim of the appellant was an allowable claim under the Act. Moreover, the determination made under the Act by the appellee together with the value of the assets attached by the State Court were evidence that the plan contained in Section 34 of the Act for equitable distribution of the debtor's estate among American creditors would not be disturbed by the issuance of the New York State Court attachment and judgment. Under these circumstances, it was apparent at the time of the issuance

of the New York State Court judgment and attachment that execution against the property would not interfere with the federal licensing or vesting power. Execution might be accomplished either by issuance of a license or by the vesting and administration of the property in accordance with Section 34 of the Act, and the action of the New York State Court did not purport to interfere with this federal power to act in either direction, to license or to vest.[20]

At the time that the appellant's attachment and judgment were issued, there did not exist any paramount power in the appellee to disturb the execution of the New York State Court judgment, by refusing either to issue a license or to vest and administer the United property.

At the time the appellant's attachment and judgment issued there did not exist any paramount power in the appellee to disturb the execution of the New York State Court judgment for the purpose of taking the attached property and disposing of the same or its proceeds to other persons. *United States* v. *Pink*, 315 U.S. 203 (1942).

b. *The property interest of appellant may not be taken away without due process of law.*

The Act expressly protects a lien interest of a United States citizen obtained without contravention of the purposes of the Act. The Courts have indicated that if this were not so, the constitutional validity of the Act would be in jeopardy. U.S.C.A., Title 50, App. §§ 8 and 9(a); *McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241 (1949); *Silesian-American Corp.* v. *Markham*, 156 F. 2d 793, 797 (C.C.A. 2d, 1946), aff'd 332 U.S. 469 (1947); *Stoehr* v.

[20] An attachment which is obtained after the Appellee's determination under the Act has been made and which will not establish any preference among American creditors is distinct from the attachment with which the Second Circuit was concerned in *Orvis* v. *McGrath*, 198 F. 2d, 708 (C.C.A. 2d, 1952), cert. granted, No. 404, December 15, 1952, 21 U.S. Law Week 3170.

Wallace, supra; Mayer v. *Garvan, supra; Garvan* v. *$20,-000 Bonds,* 265 F. 477 (C.C.A. 2d, 1920); *Simon* v. *Miller,* 298 F. 520 (D.Ct. S.D.N.Y., 1923); *Kahn* v. *Garvan,* 263 F. 909 (D.Ct. S.D.N.Y., 1920).

The appellant's lien interest is a property right which is protected by the Fifth Amendment of the Constitution. *Lynch* v. *United States,* 292 U.S. 571 (1934); *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398 (1934); *State of Louisiana* v. *City of New Orleans,* 12 Otto (U.S.) 203 (1880).

c. *The refusal of the appellee to license or vest pending a change in the act threatens to take appellant's property.*

The appellee in effect admits that its purpose in refusing to license or vest is to preserve the property for vesting by the Government when or if it will be empowered to give the proceeds to persons other than the appellant. The appellee, in effect, admits that his refusal to license or vest will continue until arrangements have been made to accomplish this purpose. These admissions are clearly sufficient in themselves to establish that the refusal of the appellee—if permitted to continue—will defeat the appellant's recovery of his debt claim and make his attachment lien useless.

CONCLUSION

The refusal of the appellee to license or vest the property is depriving appellant of his right to payment and threatening to take appellant's property in violation of the Fifth Amendment of the Constitution.

III.

The Court Has Jurisdiction To Order the Appellee To Cease and Desist from Unlawfully "Blocking" Payment of Appellant's Claim.

Appellant contends that the appellee is blocking payment of appellant's claim without any authority to do so and in violation of the Act. He contends that, because this "blocking" prevents the execution of a valid New York State Court judgment and attachment, it deprives him of property without due process of law in violation of the Fifth Amendment of the Constitution.

Appellant clearly asserts a right to relief under the Constitution and laws of the United States. *Bell* v. *Hood,* 327 U.S. 678 (1946); *Gully* v. *First National Bank,* 299 U.S. 109 (1936).

It is now well settled that this Court has jurisdiction to enjoin an officer of the federal government who has exceeded his statutory authority. *The Youngstown Sheet and Tube Co., et al.* v. *Sawyer,* supra; *Waite* v. *Macy,* 246 U.S. 606 (1918); *Philadelphia Co.* v. *Stimson* 223 U.S. 605 (1912); *American School* v. *McAnnulty,* 187 U.S. 94 (1902); *State of New Mexico et al.* v. *Backer et al.,* 199 F. 2d 426, 428 (C.C.A. 10th, 1952).

In *Waite* v. *Macy, supra,* a bill was brought to enjoin tea appraisers of the Secretary of the Treasury from applying a regulation asserted to be illegal whereby the appraisers were preventing the importation into this

country of the plaintiff's tea. The Supreme Court affirmed the issuance of an injunction, and Mr. Justice Holmes stated for the Court (246 U.S. at 608-609):

> "No doubt it is true that this court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption. * * * Again, it is true that courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. * * * But in this case the superior of the appellants had promulgated a rule for them to follow which is alleged to be beyond the power of the Secretary to make. * * * The Secretary and the Board must keep within the statute * * * which goes to their jurisdiction * * * and we see no reason why the restriction should not be enforced by injunction * * *. We are satisfied that no other remedy, if there is any other, will secure the appellant's rights."

The remedy sought by the appellant is the only remedy available to the appellant, and accordingly justifies the exercise of the equity powers of the Court. *Texas & N.O.R. Co.* v. *Brotherhood of R. & S.S. Clerks*, 281 U.S. 548 (1930); *Marbury* v. *Madison*, 1 Cranch (U.S.) 137 (1803).

The appellant has a legal right which a Court of equity will protect. *Lynch* v. *United States, supra; Home Building & Loan Association* v. *Blaisdell, supra; State of Louisiana* v. *City of New Orleans, supra.*

An order enjoining the continuance of an unlawful course of conduct is a remedy within the power of the Court. *Youngstown Steel and Tube Co., et al* v. *Sawyer, supra; Ickes* v. *Fox*, 300 U.S. 82 (1937); *Work* v. *Louisiana*, 269 U.S. 250 (1925); *Santa Fe Pacific R. Co.* v. *Fall*, 259 U.S. 197 (1922); *Philadelphia Co.* v. *Stimson, supra;*

Chapman v. *Santa Fe Pacific Railroad Co.*, 198 F. 2d 498 (C.C.A.D.C., 1951).

The order sought by the appellant is equivalent to an injunction against continued blocking. If the appellee is ordered to cease to block and is left free to vest, the consequence is that the appellee must *either license or vest.* Thus, it is the purpose of this action merely to enforce the provisions of the Act.[21]

This case does not concern property of the United States and does not concern any action taken by the appellee within the scope of his office. Instead, it concerns property which appellee is refusing to seize for the United States because the appellee is hoping thereby to prevent the appellant from securing the right to access to this Court which is his under Section 34 of the Act if the property is seized. It concerns a "blocking" which violates the duties of appellee's office and for which unlawful "blocking" appellee's office will not protect him from suit.

CONCLUSION

For the foregoing reasons, the judgment of the District Court for appellee should be reversed and judgment should be entered for appellant.

Respectfully submitted,

David Cobb
I. S. Weissbrodt
Paul Abrams
Attorneys for Appellant

January , 1953.

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[21] Section 17 of the Act confers jurisdiction upon the District Court "to make and enter * * * all such orders and decrees * * * as may be necessary and proper * * * to enforce the provisions of this Act * * *". See *Kahn* v. *Garvan, supra.*

SUPPLEMENT

1. Trading with the Enemy Act, C. 106, 40 Stat. 411, as amended, 50 U.S.C. App. 1 *et seq.*:

* * * *

Sec. 7.

(b)

* * * Nothing in this Act shall be deemed to prevent payment of money belonging or owing to an enemy or ally of enemy to a person within the United States not an enemy or ally of enemy, for the benefit of such person or of any other person within the United States, not an enemy or ally of enemy, if the funds so paid shall have been received prior to the beginning of the war and such payments arise out of transactions entered into prior to the beginning of the war, and not in contemplation thereof: *Provided,* That such payment shall not be made without the license of the President, general or special, as provided in this Act.

* * * *

Sec. 34.

(a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this Section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act [sections 1-6 and 7-39 of this Appendix] and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the

Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act [said sections], as amended, sections 1-6 of the Criminal Code, title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended [sections 611-621 of Title 22]; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390 [sections 781-785 of this Appendix]). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act [section 21 of this title]; and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

* * * *

2. Treaty of Peace With Hungary, effective September 15, 1947 (62 Stat., Part 2, 2109):

* * * *

Article 29

1. Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Hungary or to Hungarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Hungarian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned.

2. The liquidation and disposition of Hungarian property shall be carried out in accordance with the law of the Allied or Associated Power concerned. The Hungarian owner shall have no rights with respect to such property except those which may be given him by that law.

3. The Hungarian Government undertakes to compensate Hungarian nationals whose property is taken under this Article and not returned to them.

4. No obligation is created by this Article on any Allied or Associated Power to return industrial property to the Hungarian Government or Hungarian nationals, or to include such property in determining the amounts which may be retained under paragraph 1 of this Article. The Government of each of the Allied and Associated Powers shall have the right to impose such limitations, conditions and restrictions on rights or interests with respect to industrial property in the territory of that Allied or Associated Power, acquired prior to the com-

ing into force of the present Treaty by the Government or nationals of Hungary, as may be deemed by the Government of the Allied or Associated Power to be necessary in the national interest.

5. The property covered by paragraph 1 of this Article shall be deemed to include Hungarian property which has been subject to control by reason of a state of war existing between Hungary and the Allied or Associated Power having jurisdiction over the property, but shall not include:

(a) Property of the Hungarian Government used for consular or diplomatic purposes;

(b) Property belonging to religious bodies or private charitable institutions and used for religious or charitable purposes;

(c) Property of natural persons who are Hungarian nationals permitted to reside within the territory of the country in which the property is located or to reside elsewhere in United Nations territory, other than Hungarian property which at any time during the war was subjected to measures not generally applicable to the property of Hungarian nationals resident in the same territory;

(d) Property rights arising since the resumption of trade and financial relations between the Allied and Associated Powers and Hungary, or arising out of transactions between the Government of any Allied or Associated Power and Hungary since January 20, 1945;

(e) Literary and artistic property rights.

* * * *

3. Treasury Department Press Service No. S-337, May 20, 1947

The Treasury Department announced today that it is prepared, in appropriate cases, to grant licenses for pay-

ments to creditors of business organizations and individuals in Italy from blocked accounts in this country in which the debtors have an interest.

In announcing this step, Treasury Department officials pointed out that this announcement is a necessary preliminary to the establishment of any procedure for the release of Italian blocked assets in the United States. In this connection, Treasury Department officials referred to the letter of April 15, 1947, from Acting Secretary of State Acheson to Senator Vandenberg, which was subsequently made public, wherein it was stated that the policy of the United States is directed toward the release or return of Italian property in the United States which is blocked or has been vested.

It was stated that, in general, an application for such a license should be supported by a payment instruction or other acknowledgment by the debtor executed after September 3, 1943, the date of the Armistice with Italy. If an application is based on a court judgment, evidence should be submitted that the debtor has received actual notice of the proceedings and has had a reasonable opportunity to appear.

4. Treasury Department Press Service No. S-599, January 16, 1948

The Secretary of the Treasury announced today that the Governments of Italy, Bulgaria, Hungary, and Rumania, and nationals thereof, are no longer deemed to be "enemy nationals" within the meaning of General Ruling No. 11.

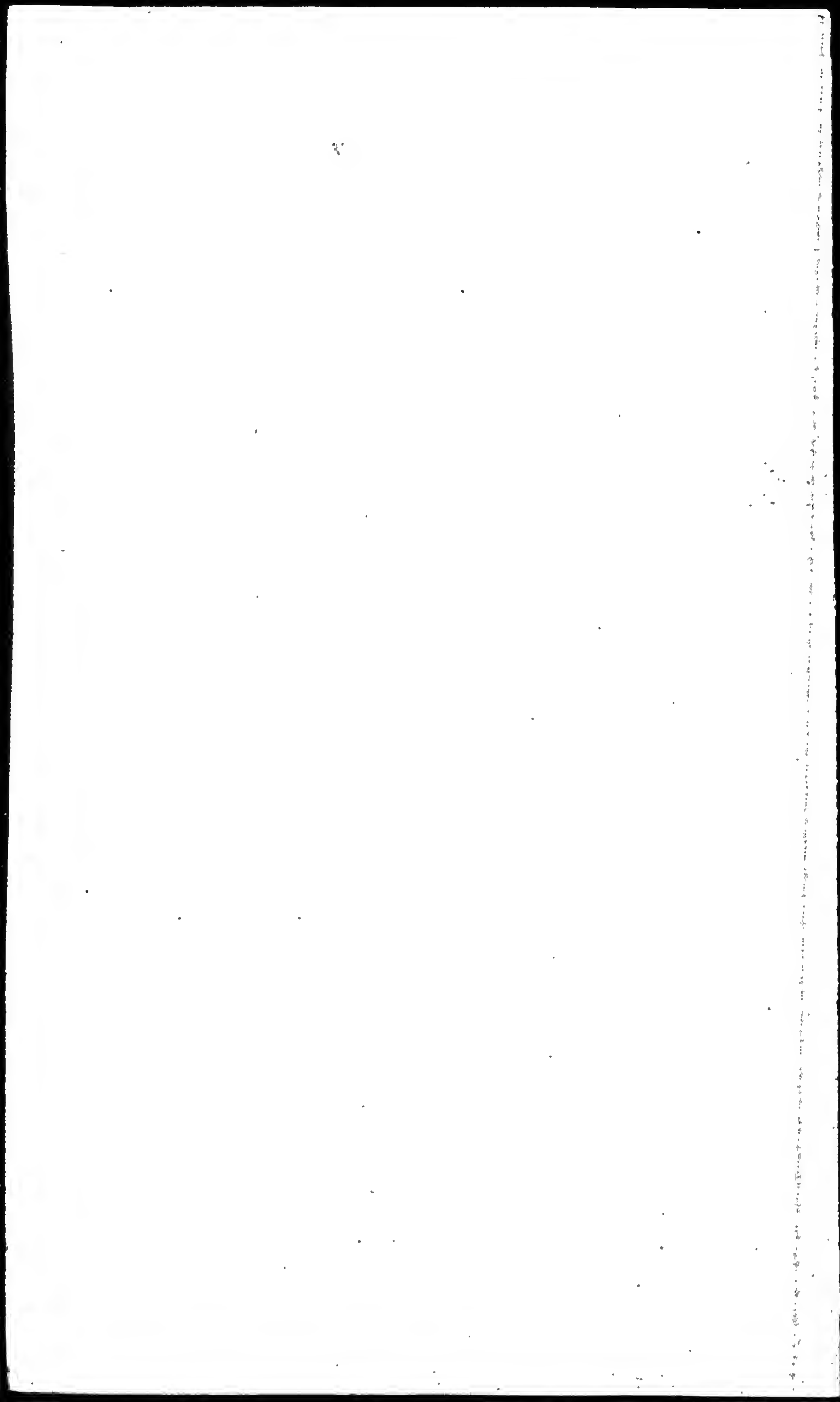
Treasury officials pointed out that today's action, which is in the form of an amendment to Public Circular No. 25, was taken in view of the ratification of the treaties of peace with Italy, Bulgaria, Hungary, and Rumania. The amendment does not authorize transactions under certain Treasury licenses nor does it in any way affect the defini-

tions appearing in Executive Order No. 9193, which established the Office of Alien Property.

It was also announced that the Treasury Department is prepared, in appropriate cases, to grant licenses for payments to creditors resident in the United States of business organizations and individuals in Bulgaria, Hungary, and Rumania from blocked accounts in this country in which the debtors have an interest. It was recalled that on May 20, 1947 a similar announcement was made concerning payments to creditors of persons in Italy.

Treasury officials explained that the step with respect to Bulgaria, Hungary, and Rumania is being taken even though the final disposition of the blocked assets of these countries has not been determined. They pointed out, however, that in taking this step the Treasury Department is in substance applying to its unblocking procedures the principles of Public Law 671, 79th Congress, which authorizes the Office of Alien Property to pay debt claims of American citizens out of vested assets of their Bulgarian, Hungarian and Rumanian debtors.

It was stated that, in general, licenses will be issued only in those instances where the debt was incurred either prior to the date of the blocking of the country involved or as a result of a transaction entered into subsequent to that date pursuant to a license specifically authorizing the use of blocked funds.



No. 11,641

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACQUES CODBAY, APPELLANT

Herbert Brownell, Jr.

v.

~~JAMES P. McGRANERY~~, ATTORNEY GENERAL AND SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, APPELLEE

BRIEF FOR THE APPELLEE

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United States Court of Appeals
For the
District of Columbia Circuit

FILED FEB 19 1953

Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

1. Whether an action which seeks an order to compel the Attorney General to elect either to license under the Trading with the Enemy Act payment of appellant's claim out of assets "blocked" by the President under said Act, or to vest the assets and pay appellant's claim under Section 34 of the Act, is a suit against the United States which cannot be maintained without its consent.

2. Whether the Attorney General is exceeding the authority delegated to him by the President under the Act by refusing either to license payments out of or vest "blocked" Hungarian assets, where his refusal is predicated partly upon doubts as to his present authority to vest, and partly upon the fact that governmental policy with respect to "blocked" Hungarian assets has not been finally determined since Hungary's default on her Treaty obligations.

3. Whether appellant by virtue of an unlicensed attachment judgment obtained in the "blocked" assets of his debtor a property interest entitling him to equitable relief against the Attorney General.

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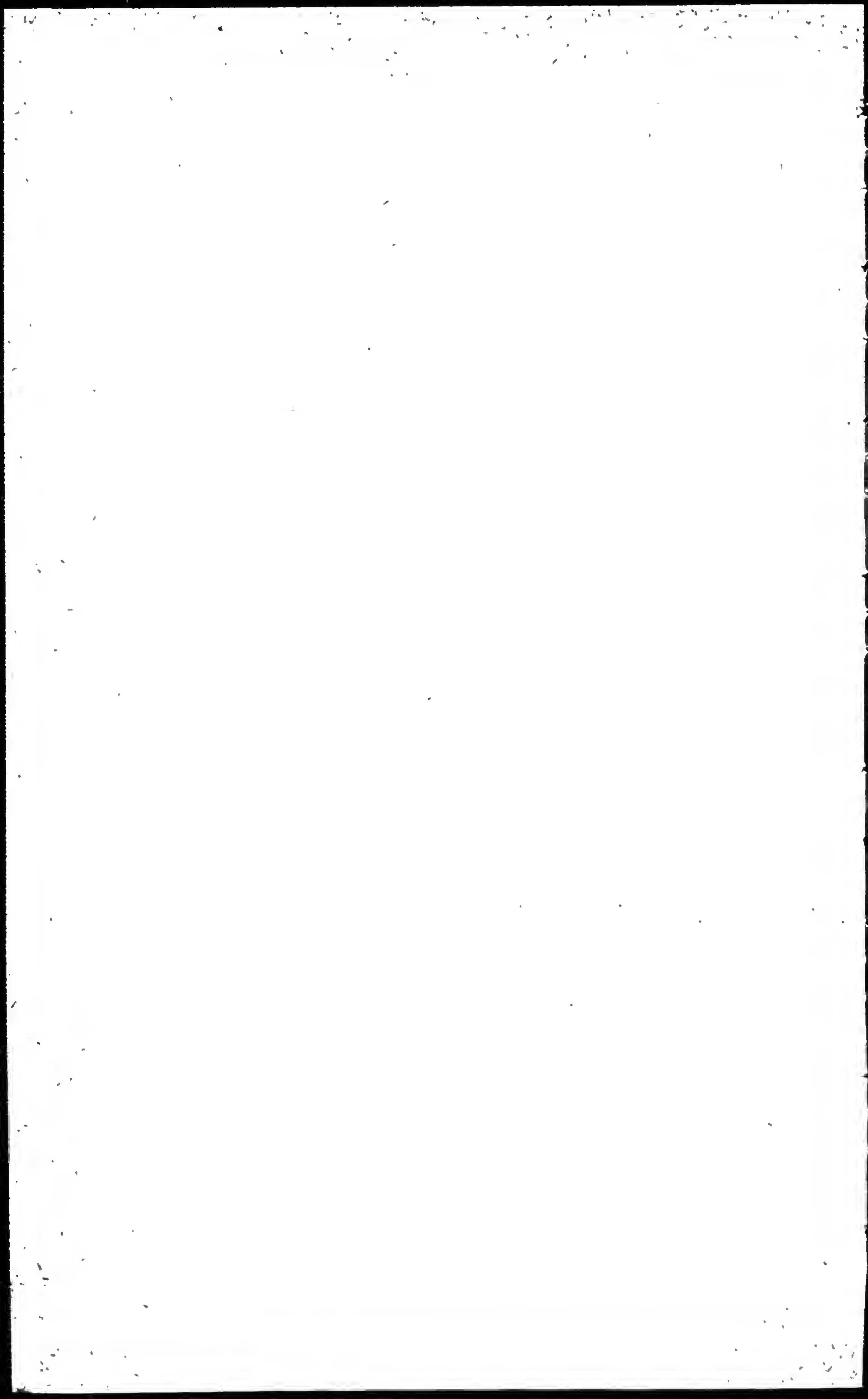

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,641

JACQUES CODRAY, APPELLANT

v.

JAMES P. MCGRANERY, ATTORNEY GENERAL AND SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, APPELLEE

BRIEF FOR THE APPELLEE

COUNTER-STATEMENT OF THE CASE

On March 13, 1941, by Executive Order 8711 (6 F.R. 1443), the President, acting under the powers delegated to him by Section 5(b) of the Trading with the Enemy Act (40 Stat. 411, 50 U.S.C. App. § 5(b)), amended Executive Order No. 8389 (5 F.R. 1400) to include and thereby "block" or "freeze" all Hungarian property within the United States. That is, transfers of Hungarian assets were prohibited unless licensed by the Secretary of the Treasury.[1] The American assets of United Incandescent Lamp & Electrical Co., Ltd. (hereafter "United"), a Hungarian corporation, were thus "frozen" and they remain "frozen" today.

Prior to this "blocking" the Paris, France, branch of United was indebted to appellant (its manager) for unpaid salary and bonuses, and United also guaranteed him against

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[1] The licensing powers of the Secretary of the Treasury under Executive Order No. 8389 were transferred to the Attorney General in 1948. Executive Order No. 9989 (13 F.R. 4891).

loss with respect to certain shares of stock in the Paris branch.[2]

In 1944, the Alien Property Custodian vested (Vesting Order 4220, 9 F.R. 12753) a claim of United against National & Transcontinental Trading Corp. in the amount of $37,457.35, and this sum was turned over to the Custodian. Appellant filed a claim under the Trading with the Enemy Act against the vested assets of United, and on June 27, 1950, his claim was allowed as a debt claim in the amount of $56,620.50 (App. 11-15).[3] After a deduction for administrative expenses and taxes, and partial payment of another debt claim, plaintiff was paid $28,560.83, thus exhausting the vested assets of United. In advising appellant of the allowance of his claim, the Acting Director of the Office of Alien Property wrote, "If additional cash should become available in debtor's account,[4] supplementary payment on this allowed claim could then be made to Dr. Jacques Codray" (App. 16).

Thereafter appellant discovered cash and securities of United valued at over $200,000 which were blocked but which had not been vested, and on January 9, 1951, he attached those assets and instituted suit in the state courts of New York to recover the unpaid portion of his debt claim with interest (App. 6). On January 22, 1951, appellant filed an application with the Office of Alien Property for a license to authorize the New York sheriff to take possession of the attached blocked assets (App. 7). The Director of the Office of Alien Property denied appellant's application on the ground that it involved "property in which there is a Hungarian interest, the disposition of which is subject to determination of over-all governmental policy" (App. 20).

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[2] See the appellant's Notice of Claim filed with the Office of Alien Property, a copy of which was attached to the affidavit of Julian M. Hare, filed in behalf of the defendant in the District Court, which is not included in the Appellant's Appendix in this Court.

[3] "App." references are to Appellant's Appendix in this Court.

[4] This referred to the account carried on the records of the Office of Alien Property in the name of United. The "account" had no relation to property which was "blocked" but not vested.

A reconsideration was denied on April 30, 1952, for the "same reason" and the Director also called appellant's attention "to the provisions of the treaty of peace with Hungary which recognized that such disposition would be made by the United States Government". (App. 21-22)

The Treaty of Peace with Hungary came into effect September 15, 1947, when it was proclaimed by the President (61 Stat. (Part 2) 2109).[5] In Article 26 of the Treaty, Hungary agreed to compensate nationals of the United States (and of other signatory nations) for war damage to their property in Hungary. Article 29 provided that the United States should have the right to seize Hungarian property within its territory and "to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts * * *"

On May 2, 1952, default judgment was entered for appellant against United in his New York State action in the sum of $62,219.86 and costs. (App. 17-19)

On the basis of this judgment, appellant instituted the present action, seeking an order to compel the Attorney General, at his election, either to issue a license to authorize payment of his judgment, or in the alternative, to compel the Attorney General to vest the blocked assets and pay his judgment under Section 34 (App. 8).

In the District Court the Attorney General moved to dismiss or for summary judgment, and the appellant cross-moved for summary judgment (App. 22-29). In support of the motion of the Attorney General affidavits were filed stating in substance: that Hungary has failed to carry out its obligations under the Treaty of Peace for the satisfaction of the claims of Americans, that Americans have war damage claims, pre-war debt claims, and claims resulting from the nationalization of property, and the value of the blocked assets available in the United States is only a fraction of the amount of such American claims; that no

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[5] *Infra*, pp. 36-40.

procedures have been established for the application of blocked Hungarian assets to war damage and nationalization claims, and there is doubt as to the adequacy of existing legislation to deal with the situation, so the Departments involved were contemplating a request to Congress for legislation providing a scheme for the distribution of the assets among the several classes of claimants and clarifying the situation as to the method of seizure; and that the Department of State had advised the Office of Alien Property that in its opinion it was important to the conduct of the foreign relations of the United States to keep the blocked Hungarian assets in status quo until a general governmental policy should be worked out (App. 22-29).

The District Court granted the motion of the Attorney General (App. 30-31). The Court held that the action was against the United States and that it had not consented to be sued, that plaintiff's unlicensed attachment and judgment did not constitute a sufficient property interest to enable him to question the propriety of the Government's action, and, that the actions of the Attorney General in refusing to license or vest were perfectly legal and discretionary. (App. 30-31)

STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. § 1 *et seq.*, Executive Orders and of the Treaty are printed in an appendix to this brief, *infra*, pp. 26-40.

SUMMARY OF ARGUMENT

The relief sought in this action, either the issuance of a license or the issuance of a vesting order, will require the Attorney General to take affirmative action which he can take only in his official capacity, and accordingly is a suit against the United States, no matter how captioned. This being so, the action must fail, even assuming the Attorney General has acted without statutory authority, because the United States has not consented to this suit. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n. 11; *Seiden* v. *Larson*, 88 U.S. App. D.C. 258, 188 F. 2d 661, certiorari denied, 341 U.S. 950.

However, there is no merit to the contention that the Attorney General has exceeded the authority delegated to him by the President. Under Section 5(b) of the Trading with the Enemy Act, the decision whether and upon what terms foreign or enemy property should be vested was left to Executive discretion. Nothing in the Trading with the Enemy Act, the legislative history, or in any court decision suggests that the decisions in this respect are subject to judicial review or that the Attorney General may be compelled to exercise his discretion in any particular manner. Moreover, since the Treaty of Peace with Hungary became effective, there is serious doubt whether in the absence of enabling legislation there is present authority under the Act to vest the assets of Hungarian nationals.

Similarly, the decision whether to license transfers of foreign funds "blocked" under Executive Order No. 8389 was left to Executive discretion by Section 5(b), and for appellant to succeed, he must establish that there was no discretion but to license. Contrary to his basic assumption, the blocking power is not ancillary to the vesting power and was not designed solely to maintain the property in status quo pending a decision to vest. Property may be blocked during periods of national emergency and one purpose of foreign funds control was to hold the property intact so that it may be disposed of in post-war negotiations and settlements. Thus the refusal to license appellant's judgment, in addition to being a discretionary decision fully authorized by law, was entirely justified for the reasons given.

In any event, appellant lacks standing to sue, for no property of appellant is involved, and no property right of his has been taken from him or denied to him.

ARGUMENT

I. This is a suit against the United States to which it has not consented

What the complaint in this action seeks is an order compelling the Attorney General either to license the payment of appellant's claim or to vest the blocked property of United. In issuing either a license or a vesting order the

Attorney General would be acting affirmatively and would be acting on behalf of the United States.

It is well settled that a suit which seeks affirmative action by an officer of the United States in his official capacity is a suit against the United States and may not be maintained without its consent. In a recent decision, *Seiden* v. *Larson*, 88 U. S. App. D. C. 258, 188 F. 2d 661, cert. denied 341 U. S. 950, this Court so held and quoted from *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, the following:

> Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of *but will require affirmative action by the sovereign* or the disposition of unquestionably sovereign property. (188 F. 2d at 665, italics added)

In the same case, in commenting on the wording of the complaint, the Court said:

> While the prayers for relief are expressed largely in negative terms, in substance and in fact the ultimate relief which appellants seek could hardly be obtained without "affirmative action by the sovereign or the disposition of unquestionably sovereign property." (188 F. 2d at 666)

In *American Dredging Co.* v. *Cochrane*, 89 U. S. App. D. C. 88, 190 F. 2d 106, this Court likewise said, in holding that it lacked jurisdiction because the suit was against the United States:

> While the petition states that the suit is against the defendants "individually" as well as in their official capacities, yet the relief sought could be secured only if they acted officially. (190 F. 2d at 109)

In *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, which this Court followed in the two cases just mentioned, both the majority and dissenting opinions applied the same test. In the majority opinion the Chief Justice said:

> Since the sovereign may not be sued, it must also appear that the action to be restrained *or directed* is

> not action of the sovereign. (337 U. S. at 693, italics added)

And in the dissenting opinion, Mr. Justice Frankfurter said:

> . . . if he is asked to exercise authority with which the State has invested him and the desired action is in fact governmental action so far as an individual is ever *pro tanto* the impersonal government, such demands are effectively demands upon the sovereign, which require the sovereign's consent as a prerequisite to the grant of judicial remedies. (337 U. S. at 712)

The principles enunciated in these cases apply to this suit. The relief which appellant seeks is an order "that defendant must at his election either issue a license to the plaintiff authorizing the satisfaction and payment of his judgment against United or vest the property blocked in the name of United and pay and satisfy plaintiff's judgment against United". (App. 8) The issuance of a license or the issuance of a vesting order are both functions which the Attorney General can exercise only in his official capacity and as an officer of the United States acting on its behalf. And the fact that the officer would be given a choice of electing between these two actions does not make that election or the course he might choose to pursue any the less official action.

It adds nothing to suggest, as appellant does, that "If the appellee is ordered to cease to block and is left free to vest, the consequence is that the appellee must *either license or vest*" (Brief, p. 48). Negative phrasing cannot obscure the reality of the situation. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 140-142. No form of words can hide the fact that what appellant seeks is a license or a vesting order.

Appellant does not challenge the validity or constitutionality of Executive Order 8711, 6 F. R. 1443 (App. 3) by which the President "blocked" the property in question. The effect of that Order was to prohibit transfers of interests in the property. *Propper* v. *Clark,* 337 U. S. 472; *Carr* v. *Yokohama Specie Bank,* 200 F. 2d 251, 256 (C. A. 9). The authority delegated to the Attorney General on Septem-

ber 30, 1948, by Executive Order 9989 (13 F. R. 4891) with respect to blocked property, was the authority to license or "unblock" what were otherwise prohibited dealings in such property. In short, what the Attorney General has been given is the authority to unlock a door which the President had locked. Since the validity of the initial "blocking" by the President is not challenged, appellant must set forth the "*statutory limitation* on which he relies" to support his conclusion that the blocking is now illegal. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. at 690 (italics added). This he has not done.

The relief sought is affirmative action, and the cases upon which appellant relies, typified by *Philadelphia Co.* v. *Stimson,* 223 U. S. 605 (Brief pp. 46-48) do not involve attempts to compel the individuals involved to take affirmative action *in their official capacities.* Those cases exemplify a well recognized rule: if an officer of the United States acts without statutory authority, or under an unconstitutional statute, he is not acting as an agent of the United States, and is liable as an individual in damages or to injunctive process for any trespass on plaintiff's property or rights which he may commit. See, *Bell* v. *Hood,* 327 U. S. 678; *Philadelphia Co.* v. *Stimson, supra.* Such suits are not against the United States, because the relief sought is negative and against the individual, the restraint of an act which the United States has not authorized, and the court may grant relief without calling upon the United States to exercise its sovereign power or upon the individual to act in his capacity as an officer of the United States.

In the instant case, however, what the appellant complains of is not a trespass by the Attorney General but his inaction. It is because the Attorney General is doing nothing that the appellant complains, and to grant relief to the appellant the Court must order the Attorney General to take affirmative action in his capacity as an officer of the United States and as the delegate of the President; it must order him to license or to vest. That is, it must order the United States,

as represented by the Attorney General, to act.[6] And when the suit is against the United States, the plaintiff, to make out jurisdiction, must show the specific statutory consent of the United States to be sued. *United States* v. *Shaw,* 309 U. S. 495, 500-501; *United States* v. *Sherwood,* 312 U. S. 584, 590.[7]

No provision in the Trading with the Enemy Act authorizes the present action. The consent to suit under Section 9(a) is expressly limited to suits against property "which may have been conveyed, transferred, assigned, delivered, or paid to the . . . Custodian or seized by him," and this Court has held that "the right of recovery is restricted to the property seized or the proceeds derived from the sale of such property by the Custodian." *Sigg-Fehr* v. *White,* 52 App. D. C. 215, 285 Fed. 949, 951. See also, *Cummings* v. *Hardee,* 70 App. D. C. 18, 102, F. 2d 622, 627, certiorari denied, 307 U. S. 637; *Uebersee Finanz-Korporation* v. *Markham,* 81 U. S. App. D. C. 284, 158 F. 2d 313, 314, affirmed, 332 U. S. 480.

Section 34 of the Act, which is now the "sole relief and remedy available to any person seeking satisfaction of a debt claim" (34(i)) is likewise expressly limited to property which has been vested or conveyed to the Custodian (34(a)). See *Cabell* v. *Clark,* 162 F. 2d 153 (C.A. 2).[8]

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[6] For earlier cases holding that where the relief sought is affirmative action by an officer *as* an officer, the suit is not against the officer as an individual, but is a suit against the United States, see: *N.Y. Guaranty Co.* v. *Steele,* 134 U.S. 230; *Belknap* v. *Schild,* 161 U.S. 10; *Wells* v. *Roper,* 246 U.S. 335.

[7] In *Hartman* v. *Federal Reserve Bank,* 55 F. Supp. 801 (E.D. Pa.) the Court seems to have held that a suit to compel an "unblocking" was a suit against the United States, for it said that the Secretary of the Treasury would have to be sued at his official residence, the District of Columbia.

[8] The confusion of appellant's argument is illustrated by the fact that he argues that Section 34 established a "parallel" plan—apparently, parallel with Section 9(a)—for the payment of creditors' claims (Brief, pp. 18-19). On the contrary, when Section 34 was added to the Act in 1946 it became the *exclusive* remedy, at least for the claims of unsecured creditors. Section 34(i); *Cabell* v. *Clark, supra.* Obviously appellant is not proceeding under Section 34 of

Thus under both Section 9(a) and Section 34, jurisdiction turns on the fact that the property in question has been vested, while in the instant case the property has not been vested. No section of the Act even intimates that a suit will lie to compel the issuance of a license or of a vesting order; those functions are committed to agency discretion. See Section 5(b).

In support of jurisdiction, appellant makes a passing reference to Section 17 of the Act.[9] But that Section provides for jurisdiction of suits *by* the Government, not *against* it. "Section 17 plainly indicates that Congress has adopted the policy of permitting the Custodian to proceed in the district courts *to enforce his rights under the Act.*" *Markham* v. *Allen,* 326 U. S. 490, 495 (italics added). "The purpose of the Section [17] is to render expeditious and summary aid to the government." *In re Garvan,* 270 Fed. 1002, 1003 (E.D.N.Y.). See also, *McGrath* v. *Manufacturers Trust Co.,* 338 U. S. 241, 246-247; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 56; *Miller* v. *Kaliwerke Aschersleben A. G.,* 283 Fed. 746, 752-753 (C.A. 2); *In re Miller,* 281 Fed. 764, 773 (C.A. 2).

As this Court held in *Story* v. *Snyder,* 87 U. S. App. D. C. 96, 184 F. 2d 454, cert. denied, 340 U. S. 866, when it is claimed that a statute gives consent to a suit against the United States, it is to be narrowly construed and not extended beyond its obvious purpose. That case dealt with a

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the Act. Appellant is seeking to reach property which has not been vested, and Section 34 deals with property "vested in or transferred to the Alien Property Custodian". Nor is he proceeding to enforce or review the determination made under Section 34 of his claim. The determination found that he had an allowable claim of $56,-620.50 and directed payment to him of $28,560.83. Here appellant, even after crediting that payment, seeks the payment of a judgment for $62,434.66.

[9] *Kahn* v. *Garvan,* 263 Fed. 909 (S.D. N.Y.), which appellant cites (Brief, p. 48, n) involved the interpretation or enforcement of an order of seizure with respect to vested property. While there is some indication that the court felt that Section 17 gave the court jurisdiction, Judge Learned Hand said, ". . . the plan of the Act is that . . . there shall be no remedies except under Section 9." 263 Fed. at 915. Of course, since 1946 exclusive jurisdiction of debt claims is under Section 34.

statute which authorized the Library of Congress to accept gifts in trust, and provided that suits could be brought "for the purpose of enforcing the provisions of any trust accepted by it. . . ." This Court held that this provision was limited to its one obvious purpose, and was not to be construed to permit a suit to collect a real estate broker's commission.

To sum up, even assuming, contrary to fact, that the action of the Attorney General is not authorized by statute, still the appellant may not maintain this suit, for what he seeks to compel by an order of this Court is action by the Attorney General as an official of the United States and on behalf of the United States, and in that respect the United States has not consented to be sued.

II. The policy of the Attorney General with respect to these Hungarian assets is fully authorized by law

As we have seen, the only argument the appellant offers in favor of jurisdiction is that the Attorney General acted without authority of law. Even apart from the considerations we have urged under Point I, *supra,* this ground for jurisdiction fails because the action taken by the Attorney General was authorized by the Act and by the Executive Orders.

Appellant's contention that the refusal of the Attorney General to license the payment of his judgment and his failure to vest the assets of United are unlawful results from a fundamental misconception as to the construction of the Trading with the Enemy Act. Thus, he states that the Attorney General "has been told to seize and liquidate all World War II Hungarian enemy assets," and that, "He has been told to pay the appellant's claim out of any assets of United that he seizes" (Brief, p. 26). On the other hand, as to licensing he asserts that "nothing remains to be done by the appellee—other than a purely ministerial issuance of a license" (Brief, p. 33).

This argument is based upon two assumptions: (1) that the Attorney General as successor to the Alien Property Custodian is under a statutory mandate to "vest", or seize,

all enemy assets in the United States; and, (2) that the authority to "block" foreign property, to prohibit its transfer, is only ancillary to and in aid of the authority to vest and has no other proper objective. So, the appellant argues, if the Attorney General has decided not to vest United's property, or is without present authority to vest it, the continued blocking of the property is not lawful and the Attorney General must "unblock" it by granting a license.

Neither of the appellant's assumptions is supported by the language of the Act, the legislative history, or the decisions. On the contrary, the authority of the Attorney General to vest enemy property is to be exercised by him at his discretion in the national interest, and the authority to license transfers of blocked property has other objectives than merely holding the property for future seizure and is also to be exercised by the Attorney General at his discretion and in the national interest.

A. *The vesting power*

The power to vest property is granted to the President by Section 5(b) (1) of the Act, as amended in 1941, which provides that:

> . . . any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President.

This authority the President delegated to the Alien Property Custodian by Executive Order No. 9193, dated July 6, 1942 (7 F.R. 5205), which amended an earlier Order, No. 9095 (7 F.R. 1971). No. 9193 read in part:

> The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest. . . .[10]

[10] By Executive Order No. 9788, dated Oct. 14, 1946, (11 F.R. 11981), this authority was transferred to the Attorney General.

Both the statute and the order speak in the language of discretion. No case even intimates that the Custodian or the Attorney General can be compelled to vest and the courts have repeatedly recognized that the decision whether to vest is in the discretion of the President or his delegate.

"For the power to vest is discretionary not mandatory." *Clark* v. *Allen,* 331 U. S. 503, 511.

See also, *Propper* v. *Clark,* 337 U. S. 472, 483; *Blank* v. *Clark,* 79 F. Supp. 373, 377 (E.D. Pa.).

And, with respect to the power of the President under Section 5 (b) one court has said:

> . . . the Section gives the President an unrestricted power to be exercised at his discretion and without any standard except that he shall act through "rules and regulations". * * * The occasions upon which such a power should be exercised are incapable of catalogue or definition, or, indeed of statement in any other terms than that the interest of the country demands the prescribed action. *Silesian-American Corporation* v. *Markham,* 156 F. 2d 793, 796 (C.A. 2), affirmed, 332 U. S. 469.[11]

However, appellant asserts that, notwithstanding this grant of discretion, "Congress has . . . directed that the assets of United to which appellant lays claim shall be used to pay appellant's claim," citing Sections 34, 7(b), and 9(a) of the Act (Brief, p. 10), and that, ". . . appellee is now making Section 34 meaningless for Hungarian enemy assets" (Brief, p. 41).

Nothing in the language of any of the sections mentioned

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[11] The same was true under Section 7(c) of the 1917 Act which provided that the Custodian "may seize" property determined to be enemy. As Assistant Attorney General Warren, one of the draftsmen of the bill, said: "It is left to his discretion to decide what property shall be taken over or transferred." *Hearings, House Committee on Interstate and Foreign Commerce,* on H.R. 4960, 65th Cong. (1917), p. 36. In *Sutherland* v. *Guaranty Trust Co.,* 11 F. 2d 696, 698 (C.A. 2), the Court said:

"The power to require and determine is vested in the Custodian by executive order. The executive authority thus lodged in the Custodian authorized him to qualify or limit any such demand in such manner and to such extent as he might in any case see fit."

even purports to create any obligation to vest. Sections 34 and 9(a) relate to property which has been vested, and Section 7(b) merely permits the payment of certain pre-war debts owed by enemies and, in the paragraph printed by the appellant (Brief, p. 49) does not refer to seizure or vesting at all. To argue that because the Act provides for the payment of debts out of vested enemy assets, it requires that *all* enemy assets be vested in order to pay debts is to commit a complete non-sequitur.

That Congress did not intend to require the Custodian or the Attorney General to vest all "blocked" enemy assets or expect them to do so is clear from the legislative history of Section 34:

> During the course of their hearings on H.R. 5089, the attention of the House Judiciary Committee was directed to certain cases of severe personal hardship which have resulted from the complete immobilization of the preliberation assets in this country of the governments and nationals of Italy, Bulgaria, Hungary, and Rumania. This immobilization has also caused serious hardships to the diplomatic missions, in the United States, of these four countries. The funds involved have not been vested by the Alien Property Custodian and therefore are not within the purview of this bill. They are frozen assets under the jurisdiction of the Treasury Department which administers the Executive orders relating to the control of foreign property in the United States. Payments from these funds have not been made, pending an over-all governmental decision as to their ultimate disposition. In view of the hardships involved, the committee recommend the issuance of licenses by the Treasury Department permitting limited withdrawals from these accounts for the support of nationals of Italy, Bulgaria, Hungary, and Rumania resident in such countries, for the support of the diplomatic missions in the United States of such countries, and in certain other cases to alleviate personal hardship. *Senate Rep. No. 1839, 79th Cong. 2d Sess., p. 5.*

In fact, the scheme of Section 34 itself is evidence against the existence of the inflexible mandate for the payment of debts which the appellant urges. Section 34(a) provides

for the payment of debts out of the property "vested in or transferred to the Alien Property Custodian," but even with respect to those properties, "The Custodian shall not be required through any judgment of any court, levy of execution or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim." Section 34(d) (*infra*, p. 28).[12]

Appellant's reliance upon the Treaty of Peace with Hungary, 61 Stat. (Part 2) 2109, as an "unequivocal directive from Congress . . . to seize and liquidate" all Hungarian enemy assets and dispose of them "in accordance with the Act" (Br. 10, 26) is a conclusion without support in the language of the Treaty.

It is true that Article 29 of the Treaty provided that the United States "shall have the right to seize" Hungarian assets and apply the proceeds against American claims against Hungary and its nationals, including debts, in accordance with the law of the United States. But the giving of the right to seize property to the *United States* is not a grant of authority to the President or the Attorney Gen-

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[12] As to Section 34(d) the Senate Committee reported:

It is provided in Section 34(d) that debt claims shall be paid only out of money held by the Custodian (i.e., not in kind); and that he cannot be required to sell property for the satisfaction of debt claims. To require sale of particular properties for the satisfaction of debt claims at any given time would prevent the Custodian from taking advantage of favorable market conditions and from executing the orderly program of liquidation and sale upon which he is actively engaged. Further, it may be impolitic that certain types of property be sold at all. For example, Italian property is not presently being sold, by reason of the request of the State Department that action be suspended. Patents are also not being sold and, in the belief of the committee, should not be sold. The President has determined upon a policy of making all enemy technology generally available. If vested enemy patents are retained by the United States, they may be made freely available to all persons desiring to use them, either by nonexclusive licenses or by dedication to the public. If, on the other hand, such patents were to be sold, they would be available only to the purchaser, who could exclude all others from their use. Over 11,000 enemy patents vested by the Alien Property Custodian have already been made available to the American public through royalty-free nonexclusive licenses. *Senate Rep. No. 1839, 79th Cong., 2d Sess.*, p. 6.

eral, or to any officer, and nothing in the Treaty purports to make the Trading with the Enemy Act's seizure power effective in time of peace. According to World War I precedents, the Treaty brought the "end of the war" as defined in Section 2 of the Act and ended the authority to vest Hungarian assets as "enemy". For example, in *Sutherland* v. *Guaranty Trust Co.*, 11 F. 2d 696, 697 (C.A. 2), the Second Circuit said:

> After the war ended and peace was restored, the Wiener Bank Verein was no longer an enemy, but a citizen of a foreign country, and the power to seize and sequester ended with the war.

In the past the well-established rule has been that a specific statute duly passed by Congress is necessary for the seizure of even enemy property. *Brown* v. *United States*, 8 Cranch 110; *Miller* v. *United States*, 11 Wall. 268, 305; *Stoehr* v. *Wallace*, 255 U.S. 239.

Moreover, apart from the fact that the Trading with the Enemy Act does not authorize seizures in time of peace, the provisions in the Treaty for the seizure of property and its application to claims do not seem to refer to the Trading with the Enemy Act. That Act provides only for the payment of contract creditors' claims (*Robertson* v. *Miller*, 266 U. S. 243; *Stasi* v. *Markham*, 69 F. Supp. 163 (N.J.)), while the Treaty seems to contemplate the payment of all types of claims, only "including debts" (Article 29), and specifically puts war damage claims (Article 26) on a par with debts.[13]

So the situation after September 15, 1947, when the Treaty became effective, was that the Attorney General's authority to vest Hungarian assets was in doubt. In contrast, the Joint Resolution of October 19, 1951, which terminated the state of war with Germany (65 Stat. 451) expressly continued in effect the vesting and seizure provi-

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[13] Section 39 of the Act, taken in conjunction with the Settlement of War Claims Act of 1948 (62 Stat. 1240), provides for the payment of prisoners of war and internees for mistreatment, but says nothing about claims for war damage to property. Moreover, the provision is only for payment out of German and Japanese property.

sions of the Trading with the Enemy Act with respect to assets acquired here by Germans prior to January 1, 1947. This was in response to the suggestion of the President in a letter dated July 9, 1951, to the Vice President (see, 97 Cong. Rec. 7762), in which he said, "There is some doubt that the vesting powers of the Trading with the Enemy Act can be exercised after the termination of the state of war, unless expressly provided for in new legislation."

B. *The refusal to license payment of appellant's claim was an authorized exercise of discretion.*

We have just shown that the action of the Attorney General in failing to vest the blocked property of United was within his statutory discretion. We propose to show now that his refusal to license payment of appellant's claim was likewise within the discretion granted him by law. Such being the case, appellant's suit must fail, for he must establish more than an error of judgment or an error in the exercise of discretion; he must show that there was no discretion but to license. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 695, 703; *Seiden* v. *Larson*, 88 U. S. App. D. C. 258, 188 F. 2d 661, 668, cert. denied, 341 U. S. 950.

Preliminarily, to clear away some of the misunderstandings revealed in appellant's brief, we must state that the Attorney General does not claim any authority to "suspend" Section 34 or any of the other provisions of the Trading with the Enemy Act, contrary to the allegations on pages 12 to 13, 33 to 35, and 40 to 41 of appellant's brief. To exercise discretion not to vest or to license is not to "suspend" the Act. Also, the Attorney General has not admitted in this action, and it is not the fact, that he has declined to license payment of appellant's claim because he "feels" that war damage and nationalization claimants should be compensated ahead of appellant.[14] The position of the Attorney General is that the 1947 Treaty with Hun-

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[14] See the statements on pages 7, 12, 14, 23, 36, and 45 of appellant's brief.

gary seems to contemplate the use of the Hungarian assets which are "blocked" but not yet vested to pay claims of Americans "including debts" but not limited to debts, but that the Congress has not yet provided any statutory basis for so doing or any method of allocation of the available assets among the various classes of claimants, and that until some statutory basis is given him, it is his duty, and he is authorized by the Act and the Executive Order, to decline to license payments which will dissipate those assets and diminish the amount that will be on hand when Congress does act.

Appellant's argument that the Attorney General has no discretion but to license payment of his claim traces back to his assumption that "the blocking authority must be viewed as nothing more than an authority preliminary or ancillary to the vesting authority" (Brief, p. 38). So, appellant argues, if the Attorney General is without authority to vest, or is not going to vest, then the holding of the assets blocked has no purpose, and the Attorney General must license, and that the issuance of a license would be a "purely ministerial act" (Brief, p. 33).

Appellant's argument ignores the development and the scheme of the Act, the legislative history, and the differences in scope and purpose between the licensing and the vesting powers.

As early as 1933, when Section 5(b) contained no authority to vest,[15] that Section was amended (48 Stat. 1), to begin with the words, "During time of war *or during any other period of national emergency declared by the President*" (italics added), and, as so amended it authorized the President to "block" certain classes of transactions. This amendment came into play in connection with the "bank holiday" of 1933 (*Smith* v. *Witherow,* 102 F. 2d 638 (C.A. 3)), and in some of the "gold clause" cases. *Ruffino* v. *United States,* 114 F. 2d 696 (C.A. 9); *Farber* v. *United States,* 114 F. 2d 5 (C.A. 9).

In 1940, when the Germans invaded Denmark and Nor-

[15] There was authority to seize "enemy" property in time of war in Section 7(c).

way, the original Executive Order No. 8389 (5 F.R. 1400) was issued, "blocking" the assets of those two countries and their nationals. The Joint Resolution of May 7, 1940 (54 Stat. 179) ratified the Executive Order, but said nothing about "vesting". As of that time, the primary purpose of the Order had no connection with vesting, it was to protect the inhabitants of the invaded countries against looting and forced transfers affecting their American assets. In reporting the Joint Resolution to the Senate, Senator Wagner, chairman of the sponsoring committee, said:

> The purpose of the joint resolution, of course, is very clear. We want to protect property within the jurisdiction of the United States which is owned by these [invaded] governments or their nationals. (86 Cong. Rec. 5006).

He repeated his statement in a colloquy with Senator Connally:

> Mr. Connally. And is not this measure for the purpose of preventing the change of title of the property here in the United States by conquest or by any other forcible or violent means?
>
> Mr. Wagner. That is exactly the purpose. (86 Cong. Rec. 5007)

See also, 86 Cong. Rec. 5178, 5179.

As the war spread, amendments added other countries to the Order, until, by the Summer of 1941, there were over 30 countries "designated in this Order". See, *Documents Pertaining to Foreign Funds Control* (U.S. Treasury Department, Sept. 15, 1946), pp. 4-7. During the same period the purposes of the Order developed and expanded as world conditions changed. One authoritative statement of policy was that made by the Government to the New York Court of Appeals in connection with the case of *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N.Y. 332, 43 NE 2d 345, decided in 1942, after the United States was in the war. As reported in *Zittman* v. *McGrath*, 341 U.S. 446,

453-454, the purposes of the "blocking" Order were stated to be:

> 1. Protecting property of persons in occupied countries;
> 2. Preventing the Axis, now our enemy, from acquiring any benefit from these blocked assets;
> 3. Facilitating the use of blocked assets in the United Nations war effort and protecting American banks and business institutions;
> 4. Protecting American creditors;
> 5. *Foreign relations, including post-war negotiations and settlements.* (Italics added) [16]

This history exposes the fallacy of appellant's argument. The "blocking" authority is not subordinate or ancillary to the authority to vest; it is an authority which originated independently of the power to vest, which has been employed and is now employed for purposes other than aid to or preparation for vesting, and which may be exercised in circumstances and on property where the authority to vest has no application.

Section 5(b) of the Act, which is the basis for the Executive Order, was not amended to include the power to "vest" until the First War Powers Act, 1941 (55 Stat. 838), approved Dec. 18, 1941, some 20 months after the system of "blocking" foreign property had been instituted and after it had been used for that time for purposes short of war but in the interest of the United States, including the pro-

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[16] Compare the statement in the Treasury Department publication, *Administration of the Wartime Financial and Property Controls of the United States Government* (p. 3):

> "At its inception, Foreign Funds Control ["blocking"] had as its primary purpose the protection of the assets within the United States of invaded countries in order to prevent their falling into the hands of the invaders and in order to protect American institutions from possible adverse claims."

See also, Berger & Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Co. L. Rev. 398; Alk & Moskowitz, *Removal of United States Controls over Foreign-Owned Property*, 10 Fed. Br. J., 4, 5, 17; Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law & Contemporary Problems, 17, 22, 26, 29; Note, 41 Col. L. Rev. 1039, 1041, 1043, 1044.

tection of foreign assets against forced transfers, the protection of American banks and financial institutions against conflicting claims, and the prevention of the use of foreign assets in the United States for financing peace-time espionage and sabotage by unfriendly but not "enemy" nations.

There is nothing in the language of the 1941 amendment (called by the appellant the "Pearl Harbor amendment", Brief, p. 27) to indicate that the earlier purposes of the control of foreign property were abandoned or that it was intended to make "blocking" merely ancillary to "vesting." The addition of the power to vest foreign property, as distinguished from the power to seize enemy property under Section 7(c), was not for the purpose of erecting the rigid system of mandates for which the appellant argues, but to provide a system of "flexible powers". See, H. Rep. No. 1507, 77th Cong., 1st Sess., quoted in *Markham* v. *Cabell,* 326 U. S. 404, 411, n. 5. This report described the system of controls as one to "prevent transactions in foreign property prejudicial to the best interest of the United States * * *" (Report No. 1507, p. 3).

That the power to vest and the power to block are not identical in scope or purpose follows from the decision of the Supreme Court in *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480. The difference may be epitomized thus: the power to "block" may be exercised in time of national emergency, peace or war; the power to "vest" is a war power. The power to "block" extends to "foreign" as well as to "enemy" property, the power to "vest" to "enemy" property only.

In *Uebersee* the Court held that, while the 1941 amendment to Section 5(b) had authorized the Custodian to vest the property of any "foreign" national it had not abrogated the right of a foreign national who was not an "enemy", as defined in the Act, to recover his property in a suit under Section 9(a).[17] In practical effect, the decision limited the

[17] While the Court also held that the 1941 amendment had broadened the definition of "enemy" in Section 2 of the Act, it is clear that the Court regarded "enemy" as a term of wartime significance.

authority to "vest", in the sense of seizing property and retaining it against the former owner, to the property of "enemies".

The difference in the scope and application of the two powers is well illustrated in the case of Hungarian property. Hungarian property, including that in question in this action, was blocked on March 13, 1941 (Executive Order No. 8711, 6 F. R. 1443), but it did not become vestible as "enemy" property until June 5, 1942, when the United States declared war on Hungary (56 Stat. 307). On September 15, 1947, the Treaty of Peace with Hungary came into effect (61 Stat. (Part 2) 2109), and, as we have shown, *supra*, pp. 15-17, it would seem that thereafter Hungarian property was not "enemy" as Section 2 of the Trading with the Enemy Act defines that word. The Treaty, however, did not terminate the power to "block", and the blocking of Hungarian assets, authorized by Section 5(b) during a "period of national emergency", has been expressly continued in effect by the President. On December 19, 1950, the President proclaimed a national emergency because of the Korean situation (Proclamation No. 2914, 15 F. R. 9029), and on April 26, 1952, the President, not the Attorney General, expressly continued in effect the "blocking" order, Executive Order No. 8389, as amended. Executive Order No. 10,348 (17 F. R. 3769).[18]

On these facts, appellant's basic assumption that the authority to "block" is merely subordinate to and in aid of the authority to "vest" is altogether without foundation. If in 1942 the "blocking" of Hungarian assets had for one purpose, "Foreign relations, including post-war negotiations and settlements" (*Zittman* v. *McGrath*, 341 U. S. at 454), then in 1952 the Attorney General was certainly exercising a proper discretion when he refused to license a payment out of the assets of a national of Hungary, a "satellite" country, in view of the provisions of

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[18] Also, he continued in effect Executive Order No. 9989 (13 F.R. 4891) which delegated to the Attorney General authority "to take such action as he may deem necessary" with respect to property to which Executive Order No. 8389 applied.

the Treaty and of the advice from the Department of State that the denial of licenses for payment out of Hungarian assets "was important to the conduct of the foreign policy of the United States" (App. 24, 26).[19]

III. No constitutional issue is presented

Appellant argues that the Attorney General is threatening to take his property without due process of law (Brief, pp. 43-45). That is clearly not so.

Of course appellant's claim against United is property, but, simply as a creditor of United he has no constitutionally protected interest in the assets of his debtor. That has been specifically held under the Trading with the Enemy Act. *Banco Mexicano* v. *Deutsche Bank,* 53 App. D.C. 266, 289 Fed. 924, 928, affirmed, 263 U. S. 591; *Kogler* v. *Miller,* 288 Fed. 806 (C.A. 3); *Sutherland* v. *Norris,* 24 F. 2d 414, 415 (C.A. 3), cert. denied, 277 U. S. 602; *Synthetic Patents Co.* v. *Sutherland,* 22 F. 2d 491 (C.A. 2), cert. denied, 276 U. S. 630. And see, *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 497.

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[19] Appellant makes a subsidiary argument, which also ignores the nature of "blocking". According to appellant, in some unidentified part of the Act there is a "directive" to pay, even out of unvested assets, all claims of creditors who have established debts under Section 34 (Brief, p. 26). Apparently the argument is that once a creditor's claim against vested assets has been established, there is no "countervailing authority" to continue the blocking of unvested assets as against that creditor.

The assumed connection between Section 34 and the authority to license or to refuse to license is tenuous to the point of non-existence. The authority to license is granted "in the national interest * * * and in the interest of national defense and security". Executive Order No. 8389, as amended, *infra,* pp. 32-33. Section 34 (*infra,* pp. 27-32) makes no reference to "national interest" or to "national defense and security", and the Acting Director made no finding with respect thereto when he allowed appellant's claim as against the vested assets of United (App. 9-16). All that he found was that the appellant was eligible to be paid out of the vested assets and had a valid debt claim for $56,620.50 (App. 14-15). In any event, it is difficult to see how the allowance of a debt claim in 1950 can be read as a finding of "national interest" with respect to an attachment in 1951 of assets which have not been vested so as to compel the issuance in 1952 of a license for payment out of those unvested assets.

Nor, even assuming that appellant has a lien by virtue of his attachment, has any property of his been vested or "captured" under the Act.[20] And, according to *Orvis* v. *McGrath,* 198 F. 2d 708 (C.A. 2), his attachment lien, acquired after blocking and without a license, is not an "interest, right, or title" good as against the United States and so recoverable under Section 9(a) of the Act.[21]

The *Orvis* case was argued on certiorari in the Supreme Court on February 4, 1953, so no useful purpose would be served by a prolonged argument on this phase of the case at this time. If the Supreme Court affirms in *Orvis,* then it would seem to follow that appellant has no property interest which would give him standing to sue. *Seiden* v. *Larson,* 88 U. S. App. D. C. 258, 188 F. 2d 661, 663, 664, cert. denied, 341 U. S. 950. And even if the Supreme Court reverses in *Orvis,* the judgment of the District Court should still be affirmed here on the grounds argued under Points I and II, *supra,* since the property in question has not been vested.

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[20] Appellant seems to think that "blocked" property has been "captured" by the United States. See his reference to "Hungarian assets captured in this country during World War II but not theretofore seized" (Brief, p. 31). But "blocking" is not a seizure under the Act. During World War I a "capture" or seizure was effected by service of a "demand". *Gt. Northern Ry.* v. *Sutherland,* 273 U.S. 182; *Stöhr* v. *Wallace,* 269 Fed. 827, 835 (S.D. N.Y.), affirmed, 255 U.S. 239. During World War II the instrument of seizure was a vesting order (*Zittman* v. *McGrath,* 341 U.S. 471) and no such order has been issued as to these assets.

[21] In *State of the Netherlands* v. *Federal Reserve Bank,* C.A. 2, decided January 21, 1953, not yet reported, the Second Circuit recently approved the result reached in *Orvis.*

CONCLUSION

This action is a suit against the United States, in that it attempts to compel the Attorney General to act on behalf of the United States, and the jurisdiction fails because the United States has not consented to be sued. The appellant's action also fails because the Attorney General has acted within the scope of the discretion confided to him by the Trading with the Enemy Act and the Executive Orders and because the appellant has no standing to raise the question.

Accordingly, the judgment of the District Court should be affirmed.[22]

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FEBRUARY, 1953.

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[22] If the action is against the United States, appellant's motion to substitute Mr. Brownell for Mr. McGranery should be granted.

APPENDIX

1. Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*:

* * * * *

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 5:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising, any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 34. [as added by the Act of August 8, 1946, 60 Stat. 925] (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U. S. C. 1-6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inherit-

ance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt

claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accord-

ance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2) claims entitled to priority under sec-

tions 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof, payment may be made permits payments in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided,* That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property

Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

* * * * *

2. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

* * * * *

SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent, outside the United States, of a banking institution within the United States;

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coins or bullion or currency, by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

3. Executive Order No. 9095, March 11, 1942, 7 F. R. 1971, as amended by Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, and Executive Order No. 9567, June 8, 1945, 10 F. R. 6917:

By virtue of the authority vested in me by the Constitution, by the First War Powers Act, 1941, by the Trading with the enemy Act of October 6, 1917, as amended, and as President of the United States, it is hereby ordered as follows:

Executive Order No. 9095 of March 11, 1942, as amended to read as follows:

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the President. * * *

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to the power to direct, manage, supervise, control or vest, with respect to:

(a) Any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence

of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(b) Any other business enterprise within the United States which is a national of a foreign country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize, or sell, (iv) to direct the management in respect to operations, or (v) to vest;

(c) Any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof: *Provided, however,* That with respect to any such country or national other than Germany or Japan or any national thereof, such property or interest shall not include cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange, and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange, and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof. * * *

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10. For the purpose of this Executive Order:

(a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war

(German, Italy, Japan, Bulgaria, Hungary, and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended: *Provided, however,* That persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading with the enemy Act, as amended.

(b) The term "business enterprise within the United States" shall mean any individual proprietorship, partnership. corporation or other organization primarily engaged in the conduct of a business within the United States, and any other individual proprietorship, partnership, corporation or other organization to the extent that it has an established office within the United States engaged in the conduct of business within the United States.

11. The Secretary of the Treasury or the Alien Property Custodian, as the case may be, shall, except as otherwise agreed to by the Secretary of State, consult with the Secretary of State before vesting any property or interest pursuant to this Executive Order, and the Secretary of the Treasury shall consult with the Secretary of State before issuing any Order adding any additional foreign countries to section 3 of Executive Order No. 8389, as amended.

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4. Treaty of Peace with Hungary, effective September 15, 1947, 62 Stat. (Part 2), 2109:

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Article 26

1. In so far as Hungary has not already done so, Hungary shall restore all legal rights and interest in Hungary of the United Nations and their nationals as they existed on September 1, 1939, and shall return all property in Hungary of the United Nations and their nationals as it now exists.

2. The Hungarian Government undertakes that all property, rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Hungarian Government in connection with their return. The Hungarian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between September 1, 1939, and the coming into force of the present Treaty. In cases where the property has not been returned within six months from the coming into force of the present Treaty, application shall be made to the Hungarian authorities not later than twelve months from the coming into force of the Treaty, except in cases in which the claimant is able to show that he could not file his application within this period.

3. The Hungarian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.

In the case of Czechoslovak nationals, this paragraph shall also include transfers after November 2, 1938, which resulted from force or duress or from measures taken under discriminatory internal legislation by the Hungarian Government or its agencies in Czechoslovak territory annexed by Hungary.

4. (a) The Hungarian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national

has suffered a loss by reason of injury or damage to property in Hungary, he shall receive from the Hungarian Government compensation in Hungarian currency to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Hungarian nationals.

(b) United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 9(a) of this Article, but which have suffered a loss by reason of injury or damage to property in Hungary, shall receive compensation in accordance with sub-paragraph (a) above. This compensation shall be calculated on the basis of the total loss or damages suffered by the corporation or association and shall bear the same proportion to such loss or damage as the beneficial interests of such nationals in the corporation or association bear to the total capital thereof.

(c) Compensation shall be paid free of any levies, taxes or other charges. It shall be freely usable in Hungary but shall be subject to the foreign exchange control regulations which may be in force in Hungary from time to time.

(d) The Hungarian Government shall accord to United Nations nationals the same treatment in the allocation of materials for the repair or rehabilitation of their property in Hungary and in the allocation of foreign exchange for the importation of such materials as applies to Hungarian nationals.

(e) The Hungarian Government shall grant United Nations nationals an indemnity in Hungarian currency at the same rate as provided in sub-paragraph (a) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Hungarian property. This sub-paragraph does not apply to a loss of profit.

5. The provisions of paragraph 4 of this Article shall apply to Hungary in so far as the action which may give rise to a claim for damage to property in Northern Transylvania belonging to the United Nations or their nationals took place during the period when this territory was subject to Hungarian authority.

6. All reasonable expenses incurred in Hungary in es-

tablishing claims, including the assessment of loss or damage, shall be borne by the Hungarian Government.

7. United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Hungary by the Hungarian Government or any Hungarian authority between the date of the Armistice and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the cost of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded.

8. The owner of the property concerned and the Hungarian Government may agree upon arrangements in lieu of the provisions of this Article.

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Article 29

1. Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Hungary or to Hungarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Hungarian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned.

2. The liquidation and disposition of Hungarian property shall be carried out in accordance with the law of the Allied or Associated Power concerned. The Hungarian owners shall have no rights with respect to such property except those which may be given him by that law.

3. The Hungarian Government undertakes to compensate Hungarian nationals whose property is taken under this Article and not returned to them.

4. No obligation is created by this Article on any Allied or Associated Power to return industrial property to the Hungarian Government or Hungarian nationals, or to include such property in determining the amounts which may be retained under paragraph 1 of this Article. The Government of each of the Allied and Associated Powers shall have the right to impose such limitations, conditions

and restrictions on rights or interests with respect to industrial property in the territory of that Allied or Associated Power, acquired prior to the coming into force of the present Treaty by the Government or nationals of Hungary, as may be deemed by the Government of the Allied or Associated Power to be necessary in the national interest.

5. The property covered by paragraph 1 of this Article shall be deemed to include Hungarian property which has been subject to control by reason of a state of war existing between Hungary and the Allied or Associated Power having jurisdiction over the property, but shall not include:

(a) Property of the Hungarian Government used for consular or diplomatic purposes;

(b) Property belonging to religious bodies or private charitable institutions and used for religious or charitable purposes;

(c) Property of natural persons who are Hungarian nationals permitted to reside within the territory of the country in which the property is located or to reside elsewhere in United Nations territory, other than Hungarian property which at any time during the war was subjected to measures not generally applicable to the property of Hungarian nationals resident in the same territory;

(d) Property rights arising since the resumption of trade and financial relations between the Allied and Associated Powers and Hungary, or arising out of transactions between the Government of any Allied or Associated Power and Hungary since January 20, 1945;

(e) Literary and artistic property rights.

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Article 31

1. The existence of the state of war shall not, in itself, be regarded as affecting the obligation to pay pecuniary debts arising out of obligations and contracts which existed, and rights which were acquired, before the existence of the state of war, which became payable prior to the coming into force of the present Treaty, and which are due by the Government or nationals of Hungary to the Government or nationals of one of the Allied and Associated Powers or are due by the Government or nationals of one of the Allied and Associated Powers to the Government or nationals of Hungary.

2. Except as otherwise expressly provided in the present Treaty, nothing therein shall be construed as impairing debtor-creditor relationships arising out of pre-war contracts concluded either by the Government or nationals of Hungary.

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